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No. 96-_____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

Plaintiffs-Petitioners,

IN RE APPEAL OF DOUGLAS SMITH,

Plaintiff-Petitioners,

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

Plaintiffs-Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the courts below violate the constitutionally guaranteed due process of law rights of the Pennsylvania petitioners by denying them access to Pennsylvania courts to pursue their remedies under Pennsylvania law for illegal marketing of insurance policies in Pennsylvania, and to make a collateral attack on their wrongful inclusion in a class action settlement in a non-Pennsylvania forum?

2. Does the McCarran-Ferguson Act, which mandates application of the constitutional principle of state sovereignty to the insurance business, require the application of Pennsylvania law to lawsuits based on illegal marketing of insurance policies in Pennsylvania?

PARTIES TO THE PROCEEDING

The petitioners in this case are Ronald Coulter, Anissa Coulter, Tami Bazy, Michelle Blum, Shelley Daughenbaugh, Frieda Kamel, Patricia Frey, Joyce McCandless, Diana Johnson, Gerald DeArmitt, Ada DeArmitt, Angelo Recupero, Robert Hemcher, Thomas Rostek, JoAnn Rostek, Jennifer Marie Rostek, Nathan Bennett, Nathan Bennett, Jr., Pamela Gonder, Cory Gonder, Travis Gonder, Douglas Smith, Joseph Corriere, and Donna Corriere. All other parties to the instant proceeding are set forth in the caption on the cover of this petition.

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IN THE SUPREME COURT OF THE UNITED STATES

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IN RE APPEAL OF RONALD AND ANISSA COULTER et al.
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v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The movant parties respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in these cases.

OPINIONS BELOW

The opinions of the Magistrate Judge (App. 54a, 68a, and 78a) and the United States District Court for the Western District of Pennsylvania (App. 38a, 44a, and 49a) are unreported. The denial orders of the United States Court of Appeals for the Third Circuit (App. 1a, 35a, 36a, and 37a) are unreported.

JURISDICTION

The court of appeals entered its judgment on December 16, 1996, and a timely petition for rehearing was denied on March 12, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASES

This proceeding involves the unhappy absurdity of being forced to go to Tampa, Florida to try Pennsylvania cases.

These cases have nothing to do with Florida.

The cases were brought by consumers residing in Pennsylvania who purchased illegally marketed insurance policies from Pennsylvania agents of defendant Metropolitan Life Insurance Company (Metropolitan).

This reductio ad absurdum is brought about by Metropolitan's continuing effort to seek absolution from its Congressionally mandated obligation to comply with the insurance regulatory laws of the several states, using the device of a somewhat hastily negotiated class action settlement characterized by highly questionable adequacy of representation.

The whole basis of these actions instituted in the courts below were events which occurred in Pennsylvania in violation of Pennsylvania statutory and common law.

Petitioners were among 436,547 Pennsylvania purchasers of life insurance products from Pennsylvania agents of Metropolitan during the period of 1991-1993. (App. 246a). They are among the millions of American consumers who purchase intangible personal property products such as stocks, bonds, and life insurance policies. Petitioners are all residents of Pennsylvania; all purchases were made in Pennsylvania; and all of the Metropolitan salesmen worked out of offices in Pennsylvania.

The life insurance products in question were being illegally marketed because they had been rejected by the Pennsylvania

Insurance Commission, but they were sold anyway in violation of the Pennsylvania Insurance Company Act of 1921, 40 P.S. 391 et seq.

Additionally, the Coulters alleged Metropolitan's Pennsylvania agents fraudulently misrepresented the life insurance products they were selling by claiming they conferred substantial financial benefits above and beyond mere life insurance benefits. They used misleading labels for their alleged plans and programs such as, "50/50 Savings Plan," "Retirement Plan," and "Savings Plan." In truth, they were only whole life insurance policies. Purchasers were given physical examinations and blood tests for the insurance coverage. However, the agents gave them false assurances that they would receive financial benefits above and beyond death benefits. These misrepresentations violated not only the Pennsylvania Unfair Insurance Practices Act, 40 P.S. 1171.1 et seq, but also the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201.1, et seq., and The Pennsylvania Bad Faith Insurance Statute, 42 Pa. C.S.A. § 8371.

The Pennsylvania Insurance Commission carried out a

market conduct survey and issued a report (App. 234a) finding Metropolitan in direct violation of Pennsylvania law.

The Pennsylvania Insurance Commission stated (App. 246a):

> In summation of the above findings, a total of four hundred thirty-six thousand five hundred forty-seven (436,547) unapproved policy forms were issued to Pennsylvania consumers. Section 354 of the Insurance Company Law (40 P.S.477 b) specifically states it shall be unlawful for any insurance company doing business in the Commonwealth of Pennsylvania to issue, sell, or dispose of any policy or contract covering life insurance or annuities until the forms have been submitted to and formally approved by the Insurance Commissioner.

The Pennsylvania Insurance Commission also stated (App. 236a):

> The observed pattern of deceptive solicitations and concealed replacements by MetLife sales representatives appears to have been for the purpose of increasing their commissions.

The various, separate Petitioners then brought four separate actions against Metropolitan for compensatory and punitive damages under Pennsylvania statutory and common law. These actions were filed in the Common Pleas Court of Allegheny

County, Pennsylvania and the United States District Court for theWestern District of Pennsylvania. Metropolitan had the state court actions removed to the Federal court on the basis of diversity of citizenship. The Coulters filed an Amended Class Action Complaint on August 16, 1994 (App. 138a).

On September 23, 1994, in the Coulter case, the Western District Court of Pennsylvania granted a Motion to Stay the proceedings in Coulter pending a ruling on a proposed settlement of a class action case pending in the United States District Court for the Middle District of Florida, Tampa Division, captioned **Horton v Metropolitan Life Insurance Company**, C.S.A. No. 93-1849-CIV-T-2316, **cert denied** sub nom **Ronald and Anissa Coulter, Petitioners v Horton et al. and Metropolitan Life Insurance Company**, No. 96-423. This case involves a plaintiff class defined by Metropolitan as all persons who made their purchases

> ...based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products...(App. 249a).

This definition emphatically excludes the instant petitionerssince Metropolitan's Pennsylvania agents, through their actions and statements, made abundantly clear that life insurance was an integral part of the plans they were selling. This was not done by the Florida Metropolitan agents.

Petitioners' exclusion from the settlement class was forcefully buttressed by the negotiated Proof of Claim form approved by the Tampa court (App. 257a). The Proof of Claim form was written to determine actual membership in the settlement class and required settlement class members, who sought to make a claim, to certify the truth of the following statements:

> A. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.
> B. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.
> C. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

If any of the instant petitioners certified that they did not understand they were buying a life insurance policy, it would be a

complete lie. The class definition and Proof of Claim form unmistakably make clear that petitioners are not members of the **Horton** settlement class, and prevents them from receiving any proceeds from the class settlement. Since their case was stayed because of the Horton case, the Coulters filed an intervention motion in Horton, which was denied.

After the **Horton** case had been settled, Metropolitan then filed Motions to Transfer the instant cases to the Tampa court. The negotiating parties and the Tampa court insisted that the petitioners were included in the settlement, even though two completely distinct patterns of deception were employed, one of them in total violation of Pennsylvania law with full disclosure that life insurance was being sold.

The Magistrate Judge in Pennsylvania recommended the 1404 (a) transfer. Despite the fact that petitioners are by clear definition not members of the plaintiff class in the Tampa settlement; that petitioners are not entitled to any benefits from the Tampa settlement because they cannot make the required certification that they did not understand they were purchasing life

insurance; and that all sources of proof, all parties and witnesses, and all events related to petitioners' claims for damages have a Pennsylvania situs; the Magistrate Judge recommended that the cases be transferred, finding that he was not qualified to review the actions of the Tampa Court (App. 54a, 68a, and 78a). The Plaintiffs filed objections to the Magistrate Judge's report and recommendation. The United States District Court for the Western District of Pennsylvania adopted the Magistrate Judge's opinion as its own (App. 38a, 44a, and 49a). These actions implemented amost grievous form of forum shopping.

Petitioners filed Petitions for a Writ of Mandamus with the United States Court of Appeals for the Third Circuit on December 18, 1996. The court denied the petitions without opinion on February 13, 1997. (App. 35a, 36a, and 37a). A petition for rehearing (App. 3a) was timely filed and was denied without opinion on March 12, 1997. (App. 1a).

ARGUMENT

A. THE COURTS BELOW VIOLATED THE CONSTITUTIONALLY GUARANTEED DUE PROCESS OF LAW RIGHTS OF THE PENNSYLVANIA PETITIONERS BY

DENYING THEM ACCESS TO PENNSYLVANIA COURTS TO PURSUE THEIR REMEDIES UNDER PENNSYLVANIA LAW FOR ILLEGAL MARKETING OF INSURANCE POLICIES IN PENNSYLVANIA, AND TO MAKE A COLLATERAL ATTACK ON THEIR WRONGFUL INCLUSION IN A CLASS ACTION SETTLEMENT IN A NON-PENNSYLVANIA FORUM

The courts below have taken the instant cases in which all events, witnesses, parties, and applicable laws are related to Pennsylvania -- and ordered that they be tried in Florida!

This incredible result compels review by this Court because it unconstitutionally denies access to Pennsylvania courts for the Pennsylvania petitioners to pursue their remedies under Pennsylvania law, and to make a collateral attack on their wrongful inclusion in a class action settlement in a non-Pennsylvania forum.

To resolve a motion to transfer venue, a district court must weigh in the balance factors bearing on convenience and fairness, Gulf Oil Corp. v. Gilmore, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), including:

1. Plaintiff's choice of forum. In these cases, the forums chosen by the plaintiffs were the Court of Common Pleas of Allegheny County, Pennsylvania and the United States District

Court for the Western District of Pennsylvania.

2. The relative ease of access to sources of proof. In these cases, the sources of proof are all in Pennsylvania, including the Pennsylvania Insurance Commission; Metropolitan's Pennsylvania offices which have, or should have, the records of the illegal marketing transactions; Metropolitan's Pennsylvania agents or their successors; the purchasers of the illegally marketed life insurance products; and other records and witnesses of the illegal transactions; all located in Pennsylvania.

3. Availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses. In Pennsylvania, the problems of costs and compulsory process would be minimized; whereas, in Florida, they would be needlessly maximized by pointless transportation for more than one thousand miles.

4. Practical considerations which would make trial of a case easy, expeditious, and inexpensive. All practical considerations in the instant cases clearly indicate that the trial of the cases would be much more easy, expeditious, and inexpensive

in Pennsylvania rather than in Florida.

The overwhelming weight of authority is that a petition for a writ of mandamus is the proper procedure to challenge the granting of a motion to transfer, but the United States Circuit Court of Appeals for the Third Circuit declined to comment on petitioners' seeking of mandamus.

In Gulf Oil Corp., vs. Gilmore, this Court in 330 U.S. at page 508, stated:

> But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

In the same case, this Court also observed in 330 U.S. page 508, stated:

> But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment. Certainly, to fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition, is to create a condition not satisfactory to court, jury or most litigants.
>
> Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation.
>
> There is an appropriateness, too, in having the trial

> of a diversity case in a forum that is at home with the state law that must govern the case, rather then having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

This Court, in Farens v John Deere Co., 494 U.S. 516, 110 S.Ct. 1274, 108 L.Ed.2d 443 (1990), summarized the opinion in the case of Van Dusen v. Barrack, infra, as follows:

> The quoted part of Van Dusen reveals three independent reasons for our decision. First §1404(a) should not deprive parties of state law advantages that exist absent diversity jurisdiction. Second §1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under §1404(a) should turn on considerations of convenience and the interest of justice, rather then on the possible prejudice resulting from the change of law. Although commentators have questioned whether the scant legislative history of §1401(a) compels reliance on these three policies, See Note, Choice of Law 123 (1965), we find it prudent to consider them in deciding whether the rule in Van Dusen applies to transfers initiated by plaintiffs. We decide that, in addition to other considerations, these policies require a transferee forum to apply the law of the transferor court, regardless of who initiates the transfer. A transfer under §1404(a), in other words, does not change the law applicable to a diversity case.

It is provided in 28 U.S.C. §1404(a) that a district court

may "[f]or the convenience of parties and witnesses, in the interest of justice... transfer any civil action to any other district or division where it might have been brought." The purposes of §1404(a) are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.

The actions of the courts below in the instant cases can only cause the waste of time, energy, and money plus unnecessary inconvenience and expense. Review by this Court is compellingly needed to prevent further instances of such maladministration of the Federal judiciary system.

It must be noted that §1404(a) authorizes transfer of a civil action only to a district or division "where it might have been brought." From both a practical and legal standpoint, it is highly questionable that petitioners' civil actions "might have been brought" in Tampa, Florida.

The Magistrate Judge's decision was based upon his statement that "Rule 1404(a) is addressed to concerns of judicial economy." This is in direct contradiction to pronouncements by

this Court and numerous lower Federal courts that §1404(a) is addressed to concerns of fairness and convenience in the interest of justice.

The United States District Court for the Western District of Pennsylvania thus found it could not entertain a collateral attack on the class action rulings of a non-Pennsylvania court and therefore could not entertain the Pennsylvania Petitioners' civil actions.

The District Court adopted the Magistrate Judge's opinion as its own. The Courts below cited not one single decision of this Court to justify their closing of the doors of the Pennsylvania courts to the Pennsylvania Petitioners.

The Magistrate Judge's decision ignored the 1404(a) factors and was based on an incorrect assumption that the court which certified a plaintiff class in a Federal class action lawsuit is a superior forum to resolve issues related to that class certification. This assumption is completely contrary to recent judicial precedent. Class action settlements and class certifications have fallen into disrepute. In 1995-1996, the following cases overturned

nationwide class certifications in Federal class actions:

The Fifth Circuit Court of Appeals overturned a class certification and faulted the trial judge for failing to analyze specifically how variations in state laws would affect the predominance and superiority criteria required by Federal Rule of Civil Procedure 23. Castanea v American Tobacco Company, 84 F.3d 734 (5th Cir. 1996).

The Sixth Circuit Court of Appeals granted a mandamus petition and directed the district court to decertify the plaintiff class. The appellate court expressed the opinion that the district court was obligated to consider how the law of negligence differs from jurisdiction to jurisdiction. In re American Medical Systems, 75 F.3d 1069 (6th Cir. 1996).

The Seventh Circuit Court of Appeals granted a petition for mandamus and ordered the district court to decertify the class. One motivation for the decision to grant mandamus was the trial court's proposal to present to the jury an instruction on negligence applicable to all fifty states. Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

The Ninth Circuit Court of Appeals held that the district court must conduct a "rigorous analysis" into whether the prerequisites of Rule 23 are met before certifying a class. It was held that the certification order was brief and conclusory, as well as conditional, and failed to fully consider all the elements. Valentino v Carter Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996).

The Third Circuit Court of Appeals held that the criteria set forth in Rule 23 for judicial approval of Federal class action proceedings and certifications of plaintiff classes must be applied to settlements of such actions. Georgine v Amchem Products, Inc., 83 F.3d. 610 (3d Cir. 1996) cert granted sub nom. Amchem Products, Inc v Windsor, 65 USLW. 3338, November 1, 1996 (No. 96-270).

Any claim that the instant class action lawsuits are impacted by the class action lawsuit against Metropolitan in the Tampa, Florida District Court must be subjected to the principles set forth by this Court in Hansberry v Lee, 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940). as follows at 311 U.S. at 44, 45:

It is one thing to say that some members of a class

> may represent other members in a litigation where the sole and common interests of the class in the litigation is either to assert a common right or to challenge an asserted obligation. ... It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group merely because it is of the class so constituted, may be deemed adequately to represent any of the others in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent; does not afford that protection to absent parties which due process requires.

The historic impact of this analysis was evidenced by the Third Circuit Court of Appeals in In Re Real Estate Title & Settlement Services Litigation, 869 F.2d 760 (1989) by stating that "Ever since Hansberry v Lee was decided in 1940 collateral attacks have been considered to be a necessary part of the class action scheme."

Because of the Stay Order in Pennsylvania, The Coulters sought to intervene in Tampa to protect their rights. The Tampa Court made no pretense that the interests of the Pennsylvania petitioners were being adequately represented. The Court

specifically stated that neither Pennsylvania law nor the law of any other state was being applied. (App. 132a). The Court denied that Attorney Behrend represented any Pennsylvanian because he had not been so designated by any court. (App. 124a). The latter assertion totally ignored the Pennsylvania petitioners' constitutional right to retain counsel of their own choice.

If the petitioners in the instant cases had been allowed to challenge the adequacy of their representation and the propriety of their inclusion in the Horton class, it is extremely probable they would have succeeded. The Tampa court, in depriving the Coulters' Motion to Intervene in the Horton case, made very clear that it did not consider these issues very seriously. In its Findings of Facts and Conclusions of Law of October 25, 1994, the Court stated (App. 128a):

> Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in this action and that Rule 23a's requirements of commonality, typicality, and adequate representation are not satisfied as to the putative subclass they allege. These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements 'may be more easily satisfied in the settlement

> context than in the more complex litigation context.' ... (Emphasis original).

This holding by the Tampa court that Rule 23's requirements are more easily met in a settlement context than in a litigation context, is completely contrary to the holding of the Third Circuit Court of Appeals in the Georgine case that Rule 23's requirements must be applied in settlements of class action lawsuits as it is in litigated class action lawsuits. The Georgine case is presently before this Court, as previously referenced.

Federal class action lawsuits are governed by Federal Rule of Civil Procedure 23. Among the governing criteria for class action lawsuits set forth in Rule 23 are numerosity, typicality, commonality, predominance, and superiority.

The United States District Court in Tampa, Florida has no expertise as to the numerosity of those harmed by these violations of Pennsylvania law; as to the typicality of the movant parties or their commonality; as to the predominance of the issues; or as to the superiority of alternatives. It is inconceivable that the Tampa court provides any societal advantages over a Pennsylvania court

as the forum for these actions.

This is an issue of widespread national importance because hundreds of thousands of persons are being swept rightfully or wrongfully into the web of class certifications in the flood of class action lawsuits currently inundating the Federal judiciary system.

As a practical matter, these thousands of persons will be denied due process of law unless they can challenge collaterally, in a forum of their own choice, their wrongful inclusion in the Horton class.

The courts below, in the present cases, have violated petitioners' constitutional due process rights by denying them an opportunity to make a collateral attack on their wrongful inclusion in the Tampa settlement.

Alleged superior expertise of the court in another forum is not a justification for a transfer set forth in 28 U.S.C. 1404 (a). Transfer is based on fairness and convenience to parties and witnesses in the interest of justice; therefore, the decision to transfer was based on erroneous grounds, and results in serious burdens on the Plaintiffs of locating counsel, cost, time, energy and

difficulty to compel testimony.

Any attempt to apply Florida law or erroneously asserted Federal common law to cases involving illegal marketing of insurance policies in Pennsylvania would violate this Court's decision in Phillips Petroleum Co. v Shutts, 472 U.S. 797, 86 L.Ed. 2 628, 105 SCt. 2965.

In that case, this Court held that application of Kansas law to class actions involving oil and gas leases predominantly in other states was sufficiently arbitrary and unfair as to exceed constitutional limits.

These cases are also controlled by this Court's decision in Van Dusen v Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964). Where this Court reviewed the propriety of a motion to transfer certain cases from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Massachusetts.

This Court held that, if the cases were transferred from the Pennsylvania court to the Massachusetts court, the Massachusetts court would be obliged to apply Pennsylvania law.

This Court further held that the United States District Court for the Eastern District of Pennsylvania had not taken this factor into account and therefore remanded the case to that court.

The exact same situation is presented in the instant cases. Neither the Magistrate Judge, the District Judge, nor the United States Circuit Court of Appeals for the Third Circuit gave any consideration at all to the fact that the Florida court would be obliged to apply Pennsylvania law to the instant cases.

Such failure to apply the precepts of this Court to the Motion to Transfer constitutes a violation of the constitutionally guaranteed due process of law rights of the petitioners and provides compelling grounds for this Court to remand these cases to the United States District Court for the Western District of Pennsylvania.

At 376 U.S. 642, this Court's opinion in the Van Dusen case stated:

> In addition, it has long been recognized that there is an appropriateness in having the trial of a diversity case in a forum that is at home with the State law that must govern the case rather than have a Court in some other forum untangle

problems in conflicts of law and in law foreign to itself.

In 1990, the following legislation was enacted in Pennsylvania:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> 1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
> 2) Award punitive damages against the insurer.
> 3) Assess court costs and attorney fees against the insurer.

This legislation has become known as the Pennsylvania Bad Faith Insurance Statute, Act 1990, Feb. 7, P.L. 11, No. 6, effective July 1, 1990, 42 Pa. C.S.A. §8371.

The decision of this Court in Van Dusen v Barrack, supra, makes clear that this legislation would apply in the Tampa court. However, forcing Pennsylvania petitioners to seek their rights under this Pennsylvania law in a Tampa, Florida courtroom, in which this law is foreign, is violative of due process.

The instant cases are all lawsuits based on violations of

Pennsylvania law within the boundaries of the Commonwealth of Pennsylvania.

An outstanding case on the right to collaterally attack a class action judgment is In re Real Estate Title & Settlement Services Litigation, 869 F.2d 760 (3rd Cir. 1989) cert. denied sub nom. Chicago Title Ins. Co. v Tucson United School District, 493 U.S. 821, 110 S.Ct. 77, 107 L.Ed. 2d 44, (1989). This case held that an Arizona School Board had the right to challenge collaterally in a United States District Court in Arizona both the adequacy of their representation and their inclusion in the plaintiff class in a prior class action lawsuit in the United States District Court for the Eastern District of Pennsylvania.

The court said:

> An absent plaintiff is not subject to the burdens of distant forum litigation (thereby creating a violation of that individual's due process rights) where it is based on a class action settlement, so long as it can challenge the adequacy of representation in the forum of its choice. Id. at 769.

The probability that petitioners would prevail in a collateral attack on the adequacy of their representation in the Horton case

is heightened by further reference to the case of In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F. 3d 768 (3rd Circuit 1995). In that case, the fact that the attorneys' fee and the class settlement were negotiated simultaneously was a significant factor in the decision to strike down the settlement. The court concluded that these simultaneous negotiations created a strong indication of a probability of a conflict of interest, that the settlement's provision for a large attorney's fee in light of what it felt was very little work were "factors which militate against the conclusion that the class' interests were sufficiently pursued." 55 F. 3d at 803. In the Horton case, class members received refunds of a few hundred to a few thousand dollars while the class attorneys received a simultaneously negotiated attorneys' fee of $2,750,000.00 for a settlement which occurred within five months from the filing of the action.

The Tampa court found that it had no need to resolve constitutional limits on the application of state choice-of-law principles, in Paragraph 53, of the Court's findings. This is

contrary to this Court's decision in **Van Dusen v Barrack**, supra; this Court's decision in **Erie Railroad Co. v Tompkins**, 58 S.Ct. 817, 304 U.S. 64, 82 L.Ed. 1188, (1938), and the McCarran-Ferguson Act, **infra**.

In **Erie**, this Court stated in 304 U.S. at 78:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Therefore, it appears that the Tampa Court's Findings of Fact and Conclusions of Law were based on confusion between a Federal Rule of Civil Procedure on the one hand with the Federal Constitution or an Act of Congress on the other.

It is thus extremely probable that a collateral attack by the petitioners on their wrongful inclusion in the **Horton** settlement class would have been successful if they had not been unconstitutionally denied access to Pennsylvania courts.

B. THE MCCARRAN-FERGUSON ACT, WHICH MANDATES APPLICATION OF THE CONSTITUTIONAL PRINCIPLE OF STATE

SOVEREIGNTY TO THE INSURANCE BUSINESS, REQUIRES THE APPLICATION OF PENNSYLVANIA LAW TO LAWSUITS BASED ON ILLEGAL MARKETING OF INSURANCE POLICIES IN PENNSYLVANIA

The Tampa Court certified a uniform nationwide class action (App. 249a), and issued a uniform nationwide injunction affecting the marketing of insurance policies (App. 113a). This violated the national policy declared by the McCarran-Ferguson Act, 15 U.S.C.A. 1011-1015, c.20, 59 Stat. 33, March 9, 1945, which provides that:

> The business of insurance and every person engaged therein shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

This is certainly a clear expression of the intent of Congress that wrongdoing by persons in the course of carrying on the business of insurance shall be subject to the State laws applicable to such wrongdoing. In the instant cases, the applicable State laws are the Pennsylvania Bad Faith Insurance Statute, the Pennsylvania Unfair Trade Practices and Consumer Protection Act, and the common law of Pennsylvania. Transfer of lawsuits based on these applicable

laws to a forum far distant from Pennsylvania is clearly in error and in violation of the constitutional principle of state sovereignty.

The McCarran-Ferguson Act emphatically declares a national policy that the insurance industry is subject to State laws and regulations, thus requiring the application of Pennsylvania law to lawsuits based on illegal marketing of insurance policies in Pennsylvania.

CONCLUSION

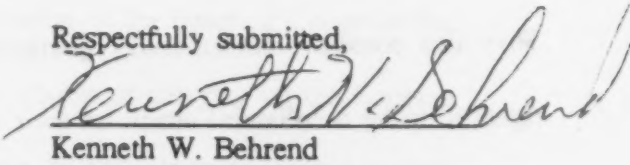
In conclusion, it is respectfully submitted that the Pennsylvania Petitioners possess constitutionally guaranteed due process of law rights to pursue their remedies in Pennsylvania courts for illegal marketing of insurance policies in Pennsylvania. They also possess constitutionally guaranteed due process of law rights to make a collateral attack on their wrongful inclusion in a class action settlement in a non-Pennsylvania forum. These rights have been violated by decisions of the United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit. The four hundred thousand unnamed putative plaintiff class members from Pennsylvania,

consumers of a multitude of tangible and intangible personal property products are susceptible of receiving the same or similar treatment unless this Court grants review.

These cases should be remanded to the United States District Court for the Western District of Pennsylvania with instructions to vacate the order granting the motion to transfer; to vacate the order granting the stay of proceedings; and to proceed with consideration of the complaints. This would be a major contribution to better administration of justice within the Federal judiciary system.

Denial of review would allow forum shopping in its most grievous form to go unrebuked.

Respectfully submitted,



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(2)
Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

Plaintiffs-Petitioners,

IN RE APPEAL OF DOUGLAS SMITH,

Plaintiff-Petitioners,

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

Plaintiffs-Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 96-3737, 96-3738, 96-3739

IN RE RONALD AND ANISSA COULTER, et al, and THOMAS ROSTEK et al's APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

IN RE DOUGLAS SMITH'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

IN RE JOSEPH AND DONNA COPRIERRE'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and MCKEE, Circuit Judges

---

The petition for rehearing filed by petitioners in the above captioned matters having been submitted to the judges who participated in the decision of this court and to all the other

available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT:

/s/
Circuit Judge

DATED: MAR 12 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-3737, D-56-E
No. 96-3738, D-55-E
No. 96-3739, D-54-E

IN RE RONALD AND ANISSA COULTERS',
et. al., and THOMAS ROSTEK'S et. al., APPEAL

IN RE DOUGLAS SMITH'S APPEAL

IN RE JOSEPH AND DONNA CORRIERES' APPEAL

PETITION FOR REHEARING IN BANC
OF ORDER DENYING
PETITIONS FOR WRITS OF MANDAMUS

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IN THE UNITED STATES COURT OF APPEALS
for the Third Circuit

IN RE RONALD AND ANISSA COULTER, et. al., and THOMAS ROSTEK et. al.'s, APPEAL Petitioners, and,	)	Docket No. 96-3737, D-56-E
IN RE DOUGLAS SMITH's APPEAL, Petitioner, and,	)	Docket No. 96-3738, D-55-E
IN RE JOSEPH AND DONNA, CORRIERES' APPEAL, Petitioners.	)	Docket No. 96-3739, D-54-E

PETITION FOR REHEARING IN BANC

Petitioners, Ronald and Anissa Coulter, Plaintiffs in Civil Action No. 94-0629, entitled Ronald and Anissa Coulter, et. al. v. Metropolitan Life Insurance Co., Thomas Rostek, Plaintiff in Civil Action No. 94-1108, captioned as Thomas Rostek, et. al. v. Metropolitan Life Insurance Co., (which were originally filed in the United States District Court for the Western District of

Pennsylvania), Douglas A. Smith, Plaintiff in Civil Action No.96-179, captioned as **Douglas Smith v. Metropolitan Life Insurance Co., et. al.**, and Joseph and Donna Corriere, Plaintiffs, in the Civil Action No. 96-833, captioned as **Corriere, et al. v. Metropolitan Life Insurance Company, et. al.**, (which were originally filed in the Court of Common Pleas of Allegheny County, Pennsylvania), hereby petition, pursuant to the provisions of Rule 40 of the Federal Rules of Appellate Procedure, for a rehearing in banc of the Court's decisions of February 13, 1997, which denied their petitions for a writ of mandamus[1].

I STATEMENT OF ISSUES PRESENTED

The Petitioners respectfully reserve their argued position as to each of the points raised in their denied petition. However, in this petition, the movants seek to address the following points

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[1] The Petitioners originally petitioned for an order by this court directing the Honorable Judge Donetta Ambrose, Judge of the United States District Court for the Western District of Pennsylvania, to vacate the orders transferring their actions to the United States District Court for the Middle District of Florida, Tampa Division, where they are now pending before Judge Steven D. Merryday.

which they believe should have mandated a different conclusion in relation to their prior petition:

(1) A writ of mandamus is the proper remedy to correct a transfer that is based on a clear abuse of discretion or is clearly against applicable law;

(2) The Petitioners, as absent class members, have a constitutional right to collaterally attack a class action settlement in the forum of their choice, pursuant to the Third Circuit opinion in **In re Real Estate Title & Settlement Services Antitrust Litigation**, 869 F.2d 760 (3rd Cir. 1989), and this right required the collateral court to make a determination as to the adequacy of their representation in the settled class and whether they are a member of the settled class;

(3) The Magistrate Judge's recommendation, and the District Court's decision adopting it, clearly misinterpreted the nature of the Corriere's case, and the standard which should be used in making

determinations on motions to transfer; and

(4) The rule in the Third Circuit, as set forth in its opinion in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996) requires the courts in this Circuit, when reviewing certification classes, to determine if the court strictly complied with the requirements of Rule 23.

II ARGUMENT

A. THE THIRD CIRCUIT HAD JURISDICTION TO REVIEW THE TRANSFER OF THE PRESENT ACTION TO FLORIDA.

In Respondent's initial argument in its response to the original Petition for Writ of Mandamus, the Respondent argued that the Third Circuit lacks the jurisdiction to hear the petition, because the Third Circuit lost jurisdiction, the moment the District Court transferred the involved actions to the Middle District of Florida. The Respondent's argument, however, ignores the clear fact that the Petitioners' Writs are challenging the transferring court's authority

to transfer the involved actions to Florida. It is well established, that the courts of appeals have jurisdiction under the power conferred by the All Writs Statute, 28 U.S.C. §1651, to correct transfers that are based on clear abuses of discretion, or are clearly against applicable law. Shutts v. Armco Steel corp., 431 F.2d 22, 23 (3rd Cir. 1970), cert denied, 40 U.S. 910, 91 S.Ct. 871, 27 L.Ed 2d 808 (1971); Wilkins v. Erickson, 584 F.2d 969, 971 (8th Cir. 1973). When a district court lacks the power or authority to transfer a case, the appellate courts have the power to order the transfer reversed, regardless of whether the case has been physically transferred. Farrell v. Wyatt, 408 F.2d 662 (2d Cir. 1969); Gower v. Leyman, 799 F.2d 925 (4th Cir. 1986); Shutts v. Armco Steel corp., 431 F.2d at 23.

Accordingly, since the Petitioners' original petitions, and the following sections of this petition, clearly establish that the district court lacked the authority to transfer the present actions, prior to making a decision as to either the adequacy of the Petitioners' representation in the Horton action, or whether they were even members of that class, this Circuit had the jurisdiction

to correct the clearly erroneous transfer, and it should have granted the Petitioner's Writs.

B. THE PETITIONERS HAVE A CONSTITUTIONAL RIGHT TO COLLATERALLY ATTACK A CLASS ACTION SETTLEMENT IN THE FORUM OF THEIR CHOICE, AND THIS RIGHT REQUIRES THE REVIEWING COURT TO MAKE A DETERMINATION AS TO THE ADEQUACY OF THE REPRESENTATION IN THE RELEVANT CLASS OR WHETHER THEY ARE A MEMBER OF THAT CLASS.

In the Magistrate Judge's Report and Recommendations, that were adopted as the opinions of the District Court, the Magistrate Judge Benson based his decision upon his belief that the **Horton** Court is the only court qualified to hear challenges to the **Horton** class settlement, and the fact that in the language in the **Horton** Court's Final Order Approving the Class Settlement, the Court attempted to retain jurisdiction to rule on these issues. The Magistrate Judge's conclusion and the District Court's decision adopting it, however, apparently ignore the underlying law of class actions and the constitutional protections that it grants to absent class members, which clearly warrant the rejection of the District

Court's Order's, and the granting of the Petitioner's Writ.

In particular, it is well settled that individuals who were not adequately represented in a prior class action, or whose individual claims are not in common with those litigated in the prior class action, may either ignore the judgement, collaterally attack it, or bring an independent action. Martin v. Wilks, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed. 2d 835 (1989); Cooper v. Federal Reserve Bank, 467 U.S. 867, ___ S.Ct. ____, ____ L.Ed.2d ____ (1984); In re Real Estate, Supra, see later case, cert denied sub nom Chicago Title Ins. Co. v. Tuscon Unified School District, 493 U.S. 821, ___ S.Ct ___, ___ L.Ed.2d ___ (1989); cf. Hansberry v. Lee, 311 U.S. 32, 42-44, 61 S.Ct. 115, 85 L.Ed. 22 (1940)(Supreme Court recognizes the right of plaintiff to bring separate action, despite prior class settlement, because prior class representatives did not adequately represent plaintiff's interests in prior suit).

More importantly, those absent-class members, who were not adequately represented in the prior class action, or whose individual claims are not in common with those litigated in the

prior class action, may challenge a class action settlement based on the adequacy of their representation and their due process protection in the forum of their choice. See In re Real Estate, Supra, (the Court recognized Arizona school board's ability to challenge the adequacy of their due process protection in a prior class action filed in the Eastern District of Pennsylvania through a collateral attack in the forum of their choice, i.e. Arizona).

The Magistrate and District Court's decision, however, ignores these well-established principles and does not address the adequacy of the Petitioners' representation in the Horton action, or the question of whether or not they were members of the Horton class. Instead, the District Court based its decision upon its belief that the Horton Court is the only court qualified to hear challenges to the Horton class settlement.

This District Court's decision, adopting the Magistrate Judge's conclusion, clearly is contradicted by the well-established case law concerning who is qualified to make decisions concerning the res judicata effect of a foreign judgment, and is contrary to the findings of the Third Circuit in In re Real Estate, Supra.

In particular, it is well established that both state courts and federal district courts are more than qualified to make decisions concerning whether they should give preclusive effects to prior class action settlements. Hansberry v. Lee, 311 U.S. 32, 42-44, 61 S. Ct. 115, 85 L. Ed. 22 (1940); Doe v. Allied Signal, Inc., 985 F.2d 908, 912 (7th Cir. 1993) In particular, as the Seventh Circuit noted in Doe v. Allied Signal, Inc.:

> As a matter of policy, state courts [as well as federal district courts] are fully capable of invoking res judicata to protect federal judgments if the second case is merely an attempt to regenerate dead claims.

985 F.2d at 912.

Moreover, in In re Real Estate, supra, this very Circuit, conclusively addressed and rejected the argument that an injunction, (issued as part of, or in conjunction with, an order approving a class action settlement), could serve as a bar to collateral litigation which challenged the adequacy of representation in the prior settlement. The Third Circuit found that such challenges do not have to be brought in the forum in which the

class action was initiated, but could be brought in the forum of the class action challenger's choosing. Id.

Underlying, the Court's decision was its recognition of the injustice and hardship which would be inflicted upon an individual if they were forced to litigate their challenges to the adequacy of the representation (or if they were a member of a class) in a distant forum. Moreover, the Court clearly and specifically recognized that funnelling all challenges to the adequacy of representation in a class action to the class action court would not serve the interests of judicial economy, because a defendant in a class action could use this hardship as a tool in its litigation strategy. In re Real Estate at 770.

The Third Circuit's holding clearly showed that this Circuit recognizes that the burden placed on a absent class member by the litigation in a distant forum can create a violation of a class member's Fifth or Fourteenth Amendment guarantee of due process. Id. at 767, n. 7. However, the Court specifically noted that "[a]n absent plaintiff is not subject to the burdens of distant forum litigation [thereby creating a violation of that individuals due

process rights] when it is bound to a class action settlement, as long as it can challenge the adequacy of representation in the forum of its choice." Id. at 769.

In the present case, however, the District Court's decision which grants the Defendant's Motion to Transfer, without inquiring into the adequacy of the Plaintiffs' representation, or whether they were even members of the Horton class, clearly disposes with the constitutional protection that the Third Circuit recognized allows class actions to pass Fifth and Fourteenth Amendment scrutiny, which should have required this Court to grant the Petitioners' Writ.

To counter this argument, the Respondent Metropolitan Life argued in its response to the original Petition, that individuals do not have a constitutional right to collaterally attack the adequacy of their representation in a prior class action in the forum of their choice. (See page 10 of Defendant's Response to original Petition). In support of this conclusion, the Respondent cited to two cases, Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3rd Cir. 1994)[hereinafter "Grimes"] and Carlough v. Amchem

Products, Inc., 10 F.3d 189 (3rd Cir. 1993)[hereinafter "Carlough"]. The Respondent's reliance on these cases, however, is clearly misplaced as they are legally and factually distinct from the present action.

In particular, the Court in Grimes, supra, did not address the issue of whether members in a subsequent suit could be considered members of the class in a prior suit, as this issue was apparently conceded. Moreover, the plaintiffs in Grimes, supra, in contrast to the present Petitioners[2], clearly were subject to the jurisdiction of the forum of the prior class action due to their position as shareholders in a corporation incorporated in that forum.

The Respondent next argued that the Plaintiff's reliance on In re Real Estate, Supra, is misplaced, because "In re Real Estate expressly applies only to classes certified under Federal Rule Civ. P. 23(b)(1) and/or (b)(2)." (See page 10 of Defendant's

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[2] The Petitioners in the present action have no ties which could bind them to the jurisdiction of the forum of the Horton action.

Response to Plaintiffs' Objections to Magistrate Judge's Report and Recommendations.)[3] Instead, the Respondent contends that the Court should look to Carlough, Supra, a case which was based on certification under Rule 23(b)(3), and which authorized the use of injunction to bar suit by an absent class member in a separate forum. Id. The Respondent Metropolitan Life's conclusion (that individuals do not have a right to collaterally attack class action settlements), however, is based on an overly broad interpretation of Carlough, supra, and it ignores the portions of In re Real Estate, supra, which address class actions as a whole, including its devotion of a major portion of its opinion to the interpretation of Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct 295, 86 L.Ed.2d 628 (1985), a case which was based on a class seeking purely monetary damages.

In particular, the Carlough, Supra, decision does not give

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[3] The Respondent's argument is interesting, as one of the very cases it cites to for its argument that there is no right to collaterally attack a class action in the forum of your choice, Grimes v. Vitalink, supra, involved a class in which the members did not have the right to opt out.

wholesale authorization for the federal courts to enjoin absent class members from litigating in other forums, as the Respondent contends. Metropolitan Life overlooks the controlling factors behind the Third Circuit's decision in Carlough, Supra: the timing of the issuance of the injunction[4]; and the fact that the state court action in Carlough, Supra, was a direct attempt to usurp the authority of the federal court[5]. These facts clearly distinguish it from both the present case and In re Real Estate, supra.

Accordingly, since none of the cases cited by the Respondent are analogous with the present factual scenario, and

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[4] In Carlough, supra, the injunction was issued prior to the class notification, the opt-out period and the fairness hearing itself. Since the opt-out period had not expired, the absent class members in Carlough, supra, still had the opportunity to exclude themselves from the class and they could pursue their claims on their own if they did not feel the class adequately protected their interests, through the opt-out procedure. The fact that this due process protection (i.e. the opt-out procedure) was still available to the absent class members was central in the court's decision. Id.

[5] In particular, in Carlough, absent class members in a federal class action (that had not yet been certified) brought a state court action seeking a declaration that the proposed settlement was unenforceable and not entitled to full faith and credit. Id. at 195.

none of them overrule the clearly established precedent, which recognizes that absent class members have the constitutional right to challenge their inclusion in a class in the forum of their choice, the District Court's order transferring the Petitioners' cases, prior to ruling on whether or not they were members of the Horton class, clearly was an abuse of discretion and was clearly against the weight of the established law, which should have warranted the granting of the Movants' original Petitions.

C. THE DISTRICT COURT'S DECISION CLEARLY MISINTERPRETS THE STANDARD WHICH SHOULD BE USED WHEN RULING ON MOTIONS TO TRANSFER.

The Magistrate Judge, in his recommendation that was adopted as the opinion of the District Court, represented that he was required to transfer the present actions to the United States District Court for the Middle District of Florida. The Magistrate's conclusion, however, and the District Court's decision adopting it, clearly have misinterpreted the law applicable to motions to

transfer.

The case which the Magistrate cites to, Eberhart v. Baker, 652 F.Supp. 1475 (W.D.Pa. 1987), clearly sets forth the standard which the Court must use when ruling on a motion to transfer. In particular the Court in Eberhart notes:

> The burden is on the moving party to establish facts supporting the motion to transfer. **A balancing of proper interests must weigh heavenly in favor of the transfer** [for the transfer to take place]. Shutt v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971).

652 F.Supp. at 1476 (emphasis added).

Four factors must be looked to when balancing the competing interests involved in a transfer which include:

> (1)the plaintiff's choice of forum; (2) the relative ease of access to the sources of proof (3) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of unwilling witnesses and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart, 652 F.Supp. at 1476; PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985).

Despite these requirements, the Magistrate's opinion,

ignores all of these factors in his recommendation. In particular, at no point did the Magistrate even mention the Plaintiff's choice of forum. At no point does the Magistrate mention the fact that the present action concerns the illegal marketing of life insurance in Pennsylvania, or the fact that the Petitioner's action sought damages under Pennsylvania law, which was different than the law of the transferee forum. Moreover, the Magistrate did not even mention the difficulty which the transfer would cause in obtaining access to the sources of proof in this action, or the expense which will be involved in compelling the attendance of unwilling witnesses. Instead the Magistrate merely states that the pendency of related litigation in the transferee court is a strong reason for transferring an case. In support of this conclusion, the Magistrate Judge cited to two decisions: Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F.Supp. 1187 (E.D.Pa. 1982) and Carver v. Knox County, 887 F.2d 1287 (6th Cir. 1287). Nevertheless, although both of these cases address the transfer of actions in the interests of judicial economy, neither presents a compelling reason which should have tipped the District Court's

decision in favor of transfer, in light of the significant problems created by this distant forum.

In particular, both cases, involved transfers to forums in which related actions were pending, creating the distinct possibility of conflicting opinions. In contrast, in the present case the decision (i.e. the settlement) in the district to which the transfer is sought is final. As a consequence, the Magistrate could have readily determined what are the parameters of the Horton decision and if, in fact, it has a preclusive effect on the present actions.

As the preceding section of this argument demonstrated, the Magistrate Judge, as well as the state court from which this action was removed, were more than qualified to make a decision on the res judicata effect of a prior class action proceeding, without forcing the Petitioners to travel to a distant forum. See Doe v. Allied Signal, Inc., 985 F.2d 908, 912 (7th Cir. 1993)(Court holds that state courts are more than qualified to invoke res judicata to protect federal judgments).

Moreover, the Magistrate Judge's conclusion, that the Horton Court is the only court qualified to hear challenges to the

Horton class settlement, clearly was contradicted by the Third Circuit, which has conclusively addressed and rejected the argument that an injunction, (issued as part of, or in conjunction with, an order approving a class action settlement), could serve as a bar to collateral litigation which challenged the adequacy of representation in the prior settlement. See In re Real Estate, Supra.

Accordingly, since it is clear that the Magistrate Judge did not even consider these factors, the failure of the District Court to consider or address them, despite this deficiency in the Magistrate Judge's recommendation, constituted a clear abuse of discretion which should have weighed in favor of granting the Movants' Petitions.

D. THE RULE IN THE THIRD CIRCUIT, AS SET FORTH IN ITS OPINION IN GEORGINE V. AMCHEM PRODUCTS, INC., 83 F.3D 610 (3RD CIR. 1996,) REQUIRES THE COURTS IN THIS CIRCUIT, WHEN REVIEWING CERTIFICATION CLASSES, TO DETERMINE IF THE COURT STRICTLY COMPLIED WITH THE REQUIREMENTS OF RULE 23.

The rule in the Third Circuit, as set forth in its opinion in Georgine v. Amchem Products, Inc., 83 F.3d 610, 625 (3rd Cir. 1996) requires the courts in this Circuit, when reviewing certification classes, to determine if the court strictly complied with the requirements of Rule 23.[6]

In Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd

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[6] The Respondent, Metropolitan Life, however, argued in its response to the Corrieres' petition, that the Horton Court's decision to certify should be reviewed based upon the standards set forth by the Eleventh Circuit, which clearly allow a lower standards for settlement classes. (See page 32 of Respondent's Brief) The Respondent's argument, however, ignores the fact that this action is being brought in the Third Circuit. Moreover, this argument may be rendered moot by the Supreme Court's anticipated decision in Amchem Products, Inc. v. Winsor, Supreme Docket No. 96-270, which was argued on February 18, 1997. It is believed that this decision will conclusively establish whether a District Court (like the Horton Court) has the necessary jurisdiction to certify a nationwide settlement class (and issue injunctions protecting that settlement), and if it does, whether that Court must insure that the class strictly compliance with the requirements of Rule 23(a) in the manner as if the case were to be litigated, as the Third Circuit stated was required in its opinion in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996), or whether it may conduct a less strict review, taking into account that the class is being certified for settlement purposes only, as was done by the Horton Court.

Cir. 1996), this Circuit, established the scope of review a court must undertake before deciding whether or not the district court had the authority to certify a class action and the jurisdiction to issue an injunction enjoining collateral litigation. Id. In particular, the Third Circuit's opinion indicates that the reviewing court must, at a minimum, review the class certification, to ensure that the original class certification satisfied all the requirements of Rule 23(a)[7] and comes within at least one provision of Rule 23(b)[8]. Id. at 624.

In addition, the Third Circuit found that, even if a class

---

[7] Rule 23(a) mandates a showing that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a)

[8] To be certified as a (b)(3) class, the judge must determine that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." FED. R. CIV. P. 23(b)(3).

was to be certified for settlement purposes only, (which is what occurred in **Horton**), Rule 23(a) and 23(b) requirements must be satisfied as if the case were to be litigated. Id. Specifically, the Court held:

> In **In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.**, cert denied sub nom. **General Motors Corp. v. French**, ___ U.S. ___, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995), we held that, for settlement classes, the 23(a) requirements must be applied as if the case were going to be litigated. We now hold that, because the 23(b)(3) requirements protect the same interests in fairness and efficiency as the 23(a) requirements, and because "[t]here is no language in [Rule 23] that can be read to authorize separate, liberalized criteria for settlement classes," id. at 799, the 23(b)(3) criteria must also be applied as if the case were to be litigated. While better policy may be to alter the class certification inquiry to take settlement into account, the current Rule 23 does not permit such an exception.

Georgine, 83 F.3d at 617-618.

Accordingly, the Court went on to hold:

> Therefore, despite the possibility that settlement-only class actions might serve the "useful purpose of ridding the courts" of the "albatross[]" represented by mass tort actions, **the rule in this circuit is that settlement class certification is not permissible unless the case would have been "triable in class form."**

Id. at 625. (citations omitted)

The Court in Georgine, further noted that an individual choice of law analysis would be necessary in order to determine if nationwide class actions could be certified, due to the numerous states in which potential class members resided. Id. at 618.

In the Horton action, however, the court failed to review the Horton class to determine if it was triable in class form or to apply any choice of law analysis. Instead, the Court used a more lenient standard because it was a settlement class.[9] Accordingly,

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[9] Evidence that the district court relied on the presence of the settlement when deciding to certify the class is presented by its Findings of Fact and Conclusions of Law Regarding Motions to Intervene and to Dismiss Notices of Intention to Appear and Object (to the Coulters' Motion to Intervene and/or Object) in which the district court states:

> The Court has not applied Florida law to Pennsylvania residents claims; **nor has it attempted to adjudicate the merits of the plaintiffs' claims.** The only issue before the Court is the fairness and adequacy of the settlement--an issue controlled by the federal law governing settlement class certification and settlement approval.

Clearly this shows that the district court did not conduct an investigation into whether the class adequately represented the

the class certification in Horton, like that in Georgine, supra, is defective, which should preclude the Horton court from retaining jurisdiction over the Petitioners (who are not named parties in the Horton action), or from enjoining their actions. Accordingly, the decision in Horton should not have served as a basis for the transfer of the present case to the Middle District of Florida, which warrants the granting of this petition.

III CONCLUSION

WHEREFORE, for the reasons set forth more fully above, Petitioners respectfully request that this Court grant their Petition for Rehearing on their Writ of Mandamus and vacate the District Court's Order granting Defendants' Motion to Transfer.

Respectfully submitted,
BEHREND & ERNSBERGER

By: /s/
Steven P. Engel
PA I.D. No. 74524
Kenneth R. Behrend
PA I.D. No. 37961

DATED: February 26, 1997

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interests of the absent class members in light of the law of those individuals' states or whether it would be triable as a class. (See attached Exhibit 4, a copy of the final Order in Horton.)

CERTIFICATE OF SERVICE

I hereby certify that, on February 26, 1997, true and correct copies of the foregoing Petition for Rehearing In Banc was served upon the following through U.S. First Class Mail:

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The Honorable Donetta Ambrose
United States District Judge
United States Post Office and Courthouse
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By: _____
Steven P. Engel, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 24, 1996
D-56E

No. 96-3737

IN RE RONALD AND ANISSA COULTER, et. al., and THOMAS ROSTEK et al.'s APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Present: GREENBERG, NYGAARD and ROTH, CIRCUIT JUDGES.

1. Petition for Writ of Mandamus.

2. Opposition by Respondent, Metropolitan Life Insurance Company to Petitions for Writs of Mandamus.

/s/
Juanita Johnson 597-3080
Deputy Clerk

ORDER

The foregoing Petition is denied.

By the Court,
/s/
Circuit Judge

Dated: FED 13 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 24, 1996
D-55E

No. 96-3738

IN RE DOUGLAS SMITH'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 6, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Present: GREENBERG, NYGAARD and ROTH, CIRCUIT JUDGES.

1. Petition for Writ of Mandamus.

2. Opposition by Respondent, Metropolitan Life insurance Company, to Petitions for Writs of Mandamus.

Rita Golden 597-3080
Deputy Clerk

ORDER

The foregoing Petition is denied.

By the Court,
/s/
Circuit Judge

Dated: FED 13 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

December 24, 1996
D-54E

No. 96-3739

IN RE JOSEPH AND DONNA CORRIERE'S APPEAL OF JUDGE DONETTA AMBROSE'S NOVEMBER 8, 1996 ORDER TRANSFERRING HIS ACTION TO UNITED STATE'S DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

Present: GREENBERG, NYGAARD and ROTH, CIRCUIT JUDGES.

1. Petition for Writ of Mandamus.

2. Opposition by Respondent, Metropolitan Life Insurance Company, to Petitions for Writs of Mandamus.

ORDER

/s/
Rita Golden 597-3080
Deputy Clerk

The foregoing Petition is denied

By the Court,

/s/
Circuit Judge

Dated: FEB 13 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

MISC. DOCKET NO. 9G-179
MDL NO. 1091
JUDGE AMBROSE/
MAGISTRATE JUDGE BENSON

This Document Relates To:

DOUGLAS A. SMITH,

Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

CIVIL ACTION NO. 96-453
JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

Defendants.

MEMORANDUM ORDER

On March 27, 1996, Civil Action No. 96-453 was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on October 25, 1996, recommended that defendant Metropolitan Life Insurance Company's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #4 at Civil Action No. 96-453) be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on all counsel and liaison counsel at Misc. Docket No. 96-179 by first-class mail on October 25, 1996. Objections were filed by plaintiff on November 4, 1996 and an amended certificate of service to plaintiff's objections was filed on November 5, 1996 (Docket #88 and #89 at Misc. Docket No. 96-179). On November 15, 1996, defendant Metropolitan Life Insurance Company filed a response to plaintiff's objections (Docket #102 at Misc. Docket No. 96-179). After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 21st day of November, 1996;

IT IS HEREBY ORDERED that defendant Metropolitan

Life Insurance Company's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #4 at Civil Action No. 96-453) is granted. The Clerk is directed to transfer Civil Action No. 96-453 to the United States District Court for the Middle District of Florida forthwith.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 25, 1996 (Docket #9 at Civil Action No. 96-453; Docket #76 at Misc. Docket No. 96-179), is adopted as the opinion of the court.

/s/
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

CC: Honorable Kenneth J. Benson United States Magistrate Judge

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CLERK'S OFFICE
United States District Court
FOR THE
WDPA

SMITH

vs.
METROPOLITAN
LIFE INS.,ET AL

Civil Action No.
96-453

There was entered on the docket 11/26/96

an order transferring case, to Middle Dist of Fla.

June A. Droch /s, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION.

Misc. Docket No. 96-179
MDL NO. 1091

JUDGE AMBROSE

THIS DOCUMENT RELATES TO:

MAGISTRATE JUDGE BENSON

Coulter v. Metropolitan Life Insurance Company,
Civil Action No. 94-629

and

Rostek v. Metropolitan Life Insurance Company,
Civil Action No. 94-1108

MEMORANDUM ORDER

On December, 4, 1995, Civil Action No.94-629 and Civil Action No. 94-1108 were referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in Accordance with the Magistrates Act, 28 U.S.C, §636(b)(1)(A) and (B) , and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on

October 8, 1996, recommended that defendant's motion to transfer Civil Actions Nos. 94-629 and 94-1108 to the United States District Court for the Middle District of Florida (Docket #2 at Miscellaneous No. 96-179) be granted. The parties were allowed ten (10) days from the date of service to file objections. Service was made on liaison counsel at Misc. Docket No. 96-179 by First-class mail on October 8, 1996. Objections were filed by all plaintiffs on October 22, 1996,(Docket #72 at Misc. Docket No. 96-179), and on October 31, 1996, defendant MetLife filed a response to plaintiffs' objections,(Docket #83 at Misc. Docket No. 96-179). After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 8th day of November, 1996;

IT IS HEREBY ORDERED that defendant's motion to transfer Civil Action No. 94-629 and Civil Action No. 94-1108 to the United States District Court for the Middle District of Florida (Docket #2 at Misc. Docket No. 96-179) is granted. The Clerk is directed to transfer Civil Action No. 94-629 and Civil Action No.

94-1108 to the United States District Court for the Middle District of Florida forthwith.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 8, 1996 (Docket #54 at Civil Action No. 94-629; Docket #60 at Civil Action No. 94-1108; Docket #62 at Misc. Docket No. 96-179), is adopted as the opinion of the court.

/s/
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

CC: Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

Misc. Docket N0.. 96-179
MDL NO. 1091

JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

This Document Relates To:

JOSEPH A. CORRIERE and DONNA J. CORRIERE, his wife,

Plaintiffs,

v.

METROPOLITAN LIFE INS. COMPANY and JAMES D. SPANGLER

Civil Action No. 96-833
JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

Defendants.

MEMORANDUM ORDER

On May 6, 1996, Civil Action No. 96-833 was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on

October 8, 1996, recommended that defendant's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) be granted, and that plaintiffs, motion to remand (Docket #13 at Civil Action No. 96-833) be denied. The parties were allowed ten (10) days from the date of service to file objections. Service was made on liaison counsel at Misc. Docket No. 96-179 by first-class mail on October 8, 1996. Objections were filed by plaintiffs Joseph A. Corriere and Donna J. Corriere on October 22, 1996 (Docket #20 at Civil Action No. 96-833) , and on October 31, 1996, defendants filed a response to plaintiffs' objections (Docket #84 at Misc. Docket No. 96-179). After de novo review of the pleadings and documents in the case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 8th day of November, 1996;

IT IS HEREBY ORDERED that defendant's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) is granted, and that plaintiffs, motion to remand (Docket #13 at Civil

Action No. 96-833) is denied. The Clerk is directed to transfer Civil Action No. 96-833 to the United States District Court for the middle District of Florida forthwith.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 8, 1996 (Docket #19 at Civil Action No. 96-833; Docket #63 at Misc. Docket No. 96-179), is adopted as the opinion of the court.

/s/
DONETTA W. AMBROSE
UNITED STATES DISTRICT JUDGE

CC: Honorable Kenneth J. Benson
United States Magistrate Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

Misc. Docket No. 96-179
MDL NO. 1091

THIS DOCUMENT RELATES TO:

Coulter v. Metropolitan Life Insurance Company,
Civil Action No. 94-629

and

Rostek v. Metropolitan Life Insurance Company,
Civil Action No. 94-1108

JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that defendant's motion to transfer these cases to the United States District Court for the

Middle District of Florida (Docket #2 at Miscellaneous No. 96-179) be granted.

II. REPORT

Presently before the court are two proposed class actions which were initiated in the Court of Common Pleas of Allegheny County, Pennsylvania, and were thereafter removed to this court by defendant MetLife. The first of these actions is styled as Coulter v. Metropolitan Life Insurance Co., and is docketed at Civil Action No. 94-629. That case was originally filed in the state court on March, 25, 1994. There are 15 named plaintiffs, who seek to represent a class consisting of all Pennsylvania resident who purchased life insurance policies or annuities from MetLife which policies or annuities were not formally approved by the Pennsylvania Insurance Commissioner. A subclass is also asserted consisting of all Pennsylvania residents who purchased retirement or savings plans which were, in reality, "nothing more than life insurance policies."

The second action is styled as Rostek v. Metropolitan Life Insurance Co., and is docketed at Civil Action No. 94-1108. This

action was commenced on June 30, 1994, and seeks to certify a class consisting of all Pennsylvania residents who purchased college savings plans in an amount over $10,000, for children under the age of 18, which were, in reality, life insurance policies on the children. There are five named plaintiffs in the Rostek action.

Defendant MetLife removed each of these actions from the state courts on the basis that members of the prospective class in each of them are barred from litigating their claims by a federal court decision in Horton v. Metropolitan Life Insurance Co., which was litigated as a class action in the United States District Court for the Middle District of Florida. MetLife has filed a motion to transfer these actions to the United States District Court for the Middle District of Florida (Docket #2 at Miscellaneous No. 96-179). MetLife asserts that transfer of these cases is appropriate because the Florida court has approved a settlement, and issued an injunction against class members litigating their claims. Further, it is asserted that the Florida court has retained jurisdiction over the question of whether a particular party is a member of the class. MetLife also filed a brief in support of the motion (Docket #3) and

a supplement to the motion (Docket #6) Plaintiffs in the Coulter and Rostek actions have responded to the motion (Docket #18 and #19), and have filed a memorandum (Docket #20) and exhibits in support thereof (Docket #21). MetLife has filed a reply (Docket #34) with exhibits in support thereof (Docket #35). Plaintiffs have filed a surreply. The motion is ripe for disposition.

LEGAL STANDARDS

A district court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. 91404(a). This statute vests broad discretion with the district court in determining when transfer is appropriate. PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985). In exercising this discretion, the court should be mindful of the purposes of §1404(a), which are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Id.

> The burden is on the moving party to establish facts supporting a motion to transfer under this section. A balancing of proper interests must weigh heavily in favor of the transfer. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). Four factors to be weighed by this Court are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart v. Baker, 652 F.Supp. 1475, 1476 (W.D.Pa.. 1.987), citing PPG Industries, supra. Further, the pendency of related litigation in the transferee court is a strong reason for transferring a case, Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F.Supp. 1187, 1192 (E.D.Pa. 1982), as is the fact that the transferee court has retained jurisdiction over the subject matter involved in the latter-filed action. Carver v. Knox County, 887 F. 2d 1287 (6th Cir. 1989), cert. denied, 495 U.S. 919 (1990) Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

THE HORTON CASE

The Horton case was filed as a nationwide class action in the United States District Court for the Middle District of Florida. On April 24, 1994, one month before the Coulter action was filed, the court in Horton preliminarily approved a proposed settlement and class notice plan and certified the following settlement class:

> [A]ll persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993.

(Exhibit A to Docket #3 at ¶1) . Potential class members who did not wish to participate were required to submit written requests for exclusion on or before June 13, 1994 (Id. at ¶9).

On October 25, 1994, after a hearing, the Florida court approved the settlement, and entered an order releasing MetLife and its agents which was "binding on all settlement class members." (Exhibit D to Docket #3 at ¶4). The court retained

jurisdiction to effectuate the order and final judgment, and as may be necessary in aid of the court's "continuing jurisdiction." (Id. at ¶7). The court then entered an order on November 8, 1995, granting a permanent injunction enjoining all Horton class members from litigating their claims in any forum other than the United States District Court for the Middle District of Florida (Exhibit F to Docket #3).

While the Horton case was pending, plaintiffs in the Coulter action moved to intervene on May 20, 1994 (Exhibit G to Docket #3). They sought to sever out from the Horton class all Pennsylvania residents. On July 18, 1994, the Florida district court held a hearing on the proposed settlement at which the Coulter plaintiffs' attorney appeared. The court overruled the objections to the proposed settlement raised by counsel, and also denied the motion to intervene (Exhibit H to Docket #3 at 49, 54). An appeal was taken from this oral order to the Court of Appeals for the Eleventh Circuit. The court then issued a written order with findings of fact and conclusions of law on October 25, 1994 (Exhibits I and J, Docket #3).

At the July 18, 1994 hearing, counsel for the Coulter plaintiffs requested exclusion from the class for his clients (Exhibit H to Docket #3 at 51-54, 112-114). This was followed by a written request for exclusion on September 19, 1994 (Exhibit K to Docket #3). This motion was denied as untimely by the court on October 24, 1994 (Exhibit L to Docket #3). This order was also appealed by the Coulter plaintiffs.

On August 26, 1994, counsel for plaintiffs filed a motion seeking a declaration that they were not members of the Horton class (Exhibit M to Docket #3). The court denied the motion without prejudice, and appointed a Special Master to resolve the issue (Exhibit N to Docket #3). Potential excluded parties were directed to file a petition with the Special Master on or before November 17, 1994 (Id.). No petition was filed, and the other named plaintiffs in the Coulter action filed an appeal from this order.

On April 2, 1996, the Eleventh Circuit Court of Appeal affirmed the lower court's orders in full. Grilli v. Metropolitan Life Insurance Co., 78 F.3d 1533, 1538 (11th Cir. 1996).

In responding to the motion to transfer, plaintiffs make several arguments. First, they assert that the order from the MDL directing that these actions remain in this district prevent this court from transferring those actions to Florida. Second, they assert that they are not members of the Horton class. Third, plaintiffs make arguments concerning whether they received adequate representation or notice in the Horton class action, and whether the court complied with Rule 23 in approving the settlement.

The first argument is the only one which need be addressed by this court on its merits. The Panel on Multidistrict Litigation has not entered any order which restricts this court's power to transfer cases removed from Pennsylvania state court. Different concerns would be implicated if one of the cases transferred from another court to this by the Panel were involved here. Rather, the cases were originally in this district as they were removed from the state court to this court. In fact, Rule 14 of the Federal Rules of Judicial Panel for Multidistrict Litigation, Rule 14, specifically provides for transfer pursuant to Rule 1404(a):

Each transferred action that has not been ter

> minated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. §1404 (a) or 1406.

(emphasis added). Thus, this is no bar to this court transferring the Coulter and Rostek actions should it decide that transfer in otherwise appropriate.

The remaining arguments raised by plaintiffs need not be addressed on their merits. The real question is whether this court or the Florida court should address them. This question has been answered in no uncertain terms by the actions of the parties and the Court of Appeals for the Eleventh Circuit. Counsel for plaintiffs, by attempting to participate in the Horton action has clearly indicated an understanding that his clients' may well be members of that class. Further, the Florida court was convinced that, at least with respect to the Coulters, its orders barred further litigation. The Court of Appeals for the Eleventh Circuit agreed with this determination.

This court ought not to sit in judgment of the actual decisions reached by its sister court in Florida with respect to the

Coulter plaintiffs. Nor should this court accept plaintiffs' invitation to ignore the fact that the Florida court has retained jurisdiction to interpret the orders it entered in all cases which may involve Horton class members. Rule 1404(a) is addressed to concerns of judicial economy. This concern is implicated where, as here, resolution of the issues raised by plaintiffs in both the Coulter and Rostek actions necessarily involve review of the scope of the proceedings undertaken in the Middle District of Florida, and the propriety of that court's orders. The most convenient, and appropriate, forum of litigating those issues is the United States District Court for the Middle District of Florida.

This conclusion applies equally to the proposed class representatives in the Rostek action, even though one of them has timely opted out of the Horton class settlement. This is so since the representative plaintiffs seek to represent a class of persons who, like the proposed class in Coulter, appear to fall within the Horton class. The final decision on whether this proposed class should be able to litigate its claims in light of the orders entered in Horton is a decision which should be reached by the court which

entered those orders.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion to transfer Civil Actions Nos. 94-629 and 94-1108 to the United States District Court for the Middle District of Florida (Docket #2 at Miscellaneous Docket No. 96-179) be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b)(1)(B) and (C) , and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/
KENNETH T. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: October 8, 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

MISC. DOCKET NO. 96-179
MDL NO. 1091
JUDGE AMBROSE/
MAGISTRATE JUDGE BENSON

This Document Relates To:

DOUGLAS A. SMITH,

Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,

CIVIL ACTION NO. 9G-453
JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

Defendants.

MAGISTRATE JUDGE'S REPORT AND RECONSIDERATION

I. RECOMMENDATION

It is respectfully recommended that defendant Metropolitan Life Insurance Company's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #4

at Civil Action No. 96-453) be granted.

II. REPORT

This is an action filed by plaintiff against defendant MetLife asserting fraudulent inducement by MetLife and its agents in selling an insurance policy to plaintiff as a "retirement plan." Initially, this matter was filed as two separate state court actions, which were consolidated in the state court and removed to this court on the basis that plaintiff is a member of a class action, Horton v. Metropolitan Life Insurance Co., Civ. No. 93-1849-CIV-T-23A (M.D.Fla.), which was settled, and which settlement allegedly prevents plaintiff from pursuing his claims in this court. MetLife has filed a motion to transfer this case to the Florida court which approved the settlement in Horton. Similar issues were raised and briefed by counsel for plaintiff in other cases pending before this court, and plaintiff was given the opportunity to offer any different arguments in opposition to transfer that he may have. No such response was filed, and the motion is ripe for disposition.

LEGAL STANDARDS

A district court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a). This statute vests broad discretion with the district court in determining when transfer is appropriate. PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985). In exercising this discretion, the court should be mindful of the purposes of §1404 (a), which are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Id.

> The burden is on the moving party to establish facts supporting a motion to transfer under this section. A balancing of proper interests must weigh heavily in favor of the transfer. Shutte v. Armco Steel Corp., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). Four factors to be weighed by this Court are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart v. Baker, 652 F.Supp. 1475, 1476 (W.D.Pa. 1987), citing PPG Industries, supra. Further, the pendency of related litigation in the transferee court is a strong reason for transferring a case, Supco Automotive Parts, Inc. v. Triangle Auto Spring Co 538 F.Supp. 1187, 1192 (E.D.Pa. 1982), as is the fact that the transferee court has retained jurisdiction over the subject matter involved in the latter-filed action. Carver v. Knox County, 887 F.2d 1287 (6th Cir. 1989), cert. denied, 495 U.S. 919 (1990); Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

THE HORTON CASE

The Horton case was filed as a nationwide class action in the United States District Court for the Middle District of Florida. On April 24, 1994, more than a year before the instant actions were commenced in state court, the United States District Court for the Middle District of Florida certified the following settlement class in Horton:

> [A]ll persons who purchased a Metlife whole life

> insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993.

(Exhibit A to Docket #3 at ¶1) . Potential class members who did not wish to participate were required to submit written requests for exclusion on or before June 13, 1994 (Id. at ¶9).

On October 25, 1994, after a hearing, the Florida court approved the settlement, and entered an order releasing MetLife and its agents which was "binding on all settlement class members." (Exhibit D to Docket #3 at ¶4). The court retained jurisdiction to effectuate the order and final judgment, and as may be necessary in aid of the court's "continuing jurisdiction." (Id. at ¶7). The court then entered an order on November 8, 1995, granting a permanent injunction enjoining all Horton class members from litigating their claims in any forum other than the United States District Court for the Middle District of Florida (Exhibit F to

Docket #3) . The allegations presented so far by plaintiff place him within the Horton class, and he does not allege that he moved to be excluded from the settlement.

In responding to the motion to transfer, plaintiff makes several arguments. First, he asserts that the order from the MDL directing that these actions remain in this district prevents this court from transferring those actions to Florida. Second, he asserts that he is not a member of the Horton class. Third, plaintiff makes arguments concerning whether he received adequate representation or notice in the Horton class action, and whether the court complied with Rule 23 in approving the settlement.

The first argument is the only one which need be addressed by this court on its merits. The Panel on Multidistrict Litigation has not entered any order which restricts this court's power to transfer cases removed from Pennsylvania state court. Different concerns might be implicated if this were one of the cases transferred by the Panel from another court to this. Rather, this case was originally in this district; it was removed from the state court to this court. In fact, Rule 14 of the Federal Rules of

Judicial Panel for Multidistrict Litigation, Rule 14, specifically provides for transfer pursuant to Rule 1404(a):

> Each transferred action that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. §1404(a), or 1406.

(emphasis added). Thus, this is no bar to this court transferring this action should it decide that transfer is otherwise appropriate.

The remaining arguments raised by plaintiff need not be addressed on their merits. The real question is whether this court or the Florida court should address them. This writer has already recommended transferring other cases to the Horton court so that it can exercise the very jurisdiction which it has retained to determine, in the first instance, whether plaintiff is, in fact, barred by the Horton settlement. A process has been established in that court, and this court should not permit plaintiff and others to challenge the Horton settlement piecemeal in courts all over the nation. Hence, the motion to transfer should be granted.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion to transfer this action to the United States District Court for the Middle District of Florida (Docket #4 at Civil Action No. 96-453) be granted.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b) (1) (13) and (C) , and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/
KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: October 25 1996

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

METROPOLITAN LIFE INSURANCE CO. SALES PRACTICES LITIGATION

Misc. Docket No. 96-179
MDL NO. 1091

JUDGE AMBROSE
MAGISTRATE JUDGE BENSON

This Document Relates To:

JOSEPH A. CORRIERE and
DONNA J. CORRIERE, his wife,
v. METROPOLITAN LIFE INSURANCE COMPANY and JAMES D. SPANGLER
CIVIL ACTION NO. 96-833

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. RECOMMENDATION

It is respectfully recommended that defendant's motion to transfer this case to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) be granted, and that plaintiffs, motion to remand (Docket #13 at Civil Action No. 96-833) be, denied.

II. REPORT

This is an action commenced by plaintiffs by Writ of

Summons in the Court of Common Pleas of Allegheny County, Pennsylvania on May 8, 1995. The complaint was filed on April 3, 1996, and the notice of removal followed on May 3, 1996 (Docket #1). The basis for removal is alleged to be a federal court decision which is res judicata and bars plaintiffs' claims. MetLife has moved to transfer this action to the United States District Court for the Middle District of Florida (Docket #5) on the basis that a decision rendered by that court in Horton v. Metropolitan Life Insurance Co., is being collaterally attacked by plaintiffs here, and that a class action settlement and the accompanying orders entered by that court bar plaintiffs' claims here. Plaintiffs have responded to the motion (Docket #9), and have filed a brief and exhibits in support of that response (Docket #9, #10 and #11). Plaintiffs have also filed a motion to remand (Docket #13), and brief in support thereof (Docket #14). MetLife has responded thereto with a brief and exhibits (Docket #17 and #18). The motions are ripe for disposition.

LEGAL STANDARDS

A district court may, "[f]or the convenience of parties and witnesses, in the interest of justice . . . transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a). This statute vests broad discretion with the district court in determining when transfer is appropriate. PPG Industries, Inc. v. Systonetics, Inc., 614 F.Supp. 1161, 1163 (W.D.Pa. 1985). In exercising this discretion, the court should be mindful of the purposes of §1404(a), which are to prevent the waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense. Id.

> The burden is on the moving party to establish facts supporting a motion to transfer under this section. A balancing of proper interests must weigh heavily in favor of the transfer. Shutte v. Armco Steel Co., 431 F.2d 22, 25 (3d Cir. 1970), cert. denied, 401 U.S. 910, 91 S.Ct. 871, 27 L.Ed.2d 808 (1971). Four factors to be weighed by this Court are: (1) plaintiff's choice of forum; (2) the relative ease of access to sources of proof; (3) availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; and (4) practical considerations which will make trial of a case easy, expeditious and inexpensive.

Eberhart v. Baker, 652 F.Supp. 1475, 1476 (W.D.Pa. 1987), citing PPG Industries, supra. Further, the pendency of related litigation in the transferee court is a strong reason for transferring a case, Supco Automotive Parts, Inc. v. Triangle Auto Spring Co., 538 F.Supp. 1187, 1192 (E.D.Pa. 1982), as is the fact that the transferee court has retained jurisdiction over the subject matter involved in the latter-filed action. Carver v. Knox County, 887 F.2d 1287 (6th Cir. 1989), cert. denied, 495 U.S. 919 (1990); Gregory-Portland Independent School District v. Texas Education Agency, 576 F.2d 81 (5th Cir. 1978).

THE HORTON CASE

The Horton case was filed as a nationwide class action in the United States District Court for the Middle District of Florida. On April 24, 1994, the court in Horton preliminarily approved a proposed settlement and class notice plan and certified the following settlement class:

> [A]ll persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part

> on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of metlife between January 1, 1990 and October 31, 1993.

(Exhibit A to Docket #3 at ¶1) . Potential class members who did not wish to participate were required to submit written requests for exclusion on or before June 13, 1994 (Id. at ¶9).

On October 25, 1994, after a hearing, the Florida court approved the settlement, and entered order releasing MetLife and its agents which was "binding on all settlement class members." (Exhibit D to Docket #3 at ¶4). The court retained jurisdiction to effectuate the order and final judgment, and as may be necessary in aid of the court's "continuing jurisdiction." (Id. at ¶7). The court then entered an order on November 8, 1995, granting a permanent injunction enjoining all Horton class members from litigating their claims in any forum other than the United States District Court for the Middle District of Florida (Exhibit F to Docket #3).

Plaintiffs in this case bought two whole life policies from a MetLife representative during the class period. Further, it is alleged that these policies were misrepresented by the agent to be retirement or investment plans. Hence, at least facially these claims are the same as those addressed by the court in Horton.

In responding to the motion to transfer, plaintiffs assert that they do not fall within the Horton class for various reasons. They also assert that they are not bound by the orders entered in that case because they did not receive sufficient notice of the action, and were not adequately represented by plaintiffs in Horton. I do not believe, however, that the merits of these arguments should be reached by this court. Rather, the initial question is which court ought to address the merits of these arguments. This question has been answered in no uncertain terms by the Florida District Court and Court of Appeals for the Eleventh Circuit. Counsel for plaintiffs in this case also represents the plaintiffs in another case filed in this district, Coulter v. Metropolitan Life Insurance Co., docketed at Civil Action No. 94-629. He attempted to intervene in the Horton action on behalf of the Coulter plaintiffs, and also

attempted to have the Florida District Court declare the Coulter plaintiffs to be outside of the Horton class. The Florida court ruled on these motions, and its rulings were upheld by the Court of Appeals for the Eleventh Circuit in Grilli v. Metropolitan Life Insurance Co., 78 F.3d 1533 (llth Cir. 1996). Likewise, the initial determination of whether the plaintiffs here are members of the Horton class, and whether they are bound by the orders entered in Horton, should be made by that court.

This court ought not accept plaintiffs' invitation to ignore the fact that the Florida court has retained jurisdiction to interpret the orders it entered in all cases which may involve Horton class members. Rule 1404(a) is addressed to concerns of judicial economy. This concern is implicated where, as here, resolution of the issues raised by plaintiffs necessarily involve review of the scope of the proceedings undertaken in the Middle District of Florida, and the propriety of that court's orders. The most convenient and appropriate forum of litigating those issues is the United States District Court for the Middle District of Florida.

MOTION TO REMAND

Plaintiffs assert that, because they are not part of the Horton class, and hence are not barred by the Horton court's orders from proceeding with their claims, they are entitled to have this case remanded. Indeed, the sole basis for the removal was that an order of a federal court barred the action. As noted above, however, this court does not, and should not reach the issue of the applicability of the Horton court's orders in this matter. Rather, the action should be transferred to the Middle District of Florida for such a determination. Thus, this court cannot reach the issue presented by plaintiffs, and the motion should be denied without prejudice to their ability to reassert that claim at a later time.

CONCLUSION

Wherefore, on the basis of the foregoing, it is respectfully recommended that the motion to transfer this action to the United States District Court for the Middle District of Florida (Docket #5 at Civil Action No. 96-833) be granted, and that plaintiffs' motion to remand (Docket #13 at Civil Action No. 96-833) be denied.

In accordance with the Magistrates Act, 28 U.S.C. Section 636 (b)(1)(B) and (C) , and Local Rule 72.1.4 B, the parties are allowed ten (10) days from the date of service to file written objections to this report. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to timely file objections may constitute a waiver of any appellate rights.

/s/
KENNETH J. BENSON
UNITED STATES MAGISTRATE JUDGE

Dated: October 8, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH A. CORRIERE and
DONNA J. CORRIERE, his wife,

Plaintiffs,

v.

Civil Action No. 96-833
JUDGE LANCASTER

METROPOLITAN LIFE INSURANCE
COMPANY and JAMES D.
SPANGLER,

Defendants.

MOTION TO TRANSFER
UNDER 28 U.S.C. §1404(a)

Defendant Metropolitan Life Insurance Company ('MetLife') hereby moves under 28 U.S.C. §1404(a) to transfer this action to the United States District Court for the Middle District of Florida, Tampa Division, where the Honorable Steven D. Merryday has retained continuing jurisdiction over a nationwide class action settlement, *Horton v. Metropolitan Life Insurance Company,* Civ. No. 93-1849-CV-T-23A, in which plaintiffs Joseph and Donna Corriere are settlement class members.

The *Horton* court has issued an order permanently enjoining all *Horton* class members and their attorneys from litigating in any other forum any claims that were or could have been asserted in the *Horton* case. A transfer would avoid interference with the *Horton* court's exercise of continuing jurisdiction and would honor the terms of that court's permanent injunction order.

As grounds for this motion, MetLife states as follows:

1. The *Horton* class action was filed in the United States District Court for the Middle District of Florida, Tampa Division, on November 1, 1993.

2. On October 25, 1994, the federal court in Florida entered an order and Final Judgment in the *Horton* case approving the proposed settlement of that action and dismissing all class members' claims on the merits and with prejudice.

3. On November 8, 1995, the *Horton* court entered an Order Granting Permanent Injunction. This order permanently enjoins all *Horton* class members from litigating *Horton*-related claims in any forum other than the United States District Court for

the Middle District of Florida, Tampa Division. The order states, in part:

> To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action. [11/8/95 Order, ¶ 6 (Ex. D to accompanying memorandum of law.]

4. Plaintiffs Joseph and Donna Corriere are members of the *Horton* class because (i) they purchased MetLife whole life insurance policies during the *Horton* class period, *(ii)* their claims fall within the *Horton* class definition, and *(iii)* they did not exclude themselves from the certified *Horton* settlement class.

5. Plaintiffs initiated this action with a praecipe for writ of summons in the Court of Common Pleas of Allegheny County, Pennsylvania, on or about May 8, 1995, long after the *Horton* court had certified the settlement class and entered its orders and judgment approving the settlement and dismissing all

class members' claims on the merits and with prejudice. Plaintiffs served their Complaint on April 3, 1996, almost five months after the *Horton* court had issued its permanent injunction enjoining prosecution of actions such as this one.

6. MetLife timely removed plaintiffs' case from the state court to this Court based on federal question jurisdiction: plaintiffs' state court action sought to pursue claims barred by res judicata under the Final Judgment entered in the *Horton* case, and it essentially constituted a collateral attack on the Florida federal court's orders and judgment.

7. The Notice of Removal also noted that the *Horton* court's permanent injunction bars plaintiffs and their attorneys from continuing to litigate this action in this Court or in a Pennsylvania state court. Any remedy that plaintiffs could have against defendants now lies with the *Horton* court in Florida.

8. MetLife therefore moves to transfer this case to the United States District Court for the Middle District of Florida, Tampa Division, under 28 U.S.C. § 1404(a), because that court is best situated to determine what relief, if any, is now available to

plaintiffs. Moreover, plaintiffs and their attorneys would violate the *Horton* court's permanent injunction if they were to continue litigating in this Court. The interests of justice and judicial efficiency thus support transferring this case to the Florida federal court under § 1404(a).

9. The principle of comity, which requires courts of coordinate jurisdiction and equal rank to avoid interfering in each other's affairs, also requires that this action be transferred to the Middle District of Florida. The *Horton* court expressly retained jurisdiction to resolve the issues raised by plaintiffs' case as well as all other matters relating to the administration of the class action settlement, and it has enjoined prosecution of related claims in other forums.

10. For the same reasons it removed this case to this Court, MetLife also has removed similar state-court cases filed by other *Horton* settlement class members. Four federal District Judges subsequently transferred six of those cases to Judge Merryday in Florida, recognizing that the *Horton* court was best suited to resolve any remaining issues in those actions. *[See* Exs.

G, H, I, J to accompanying memorandum of law.] MetLife respectfully submits that a transfer is appropriate here for the same reasons.

11. In support of this motion, MetLife is submitting a memorandum of law.

WHEREFORE, MetLife respectfully asks the Court to transfer this action under 28 U.S.C. § 1404(a) to the Honorable Steven D. Merryday, of the United States District Court for the Middle District of Florida, Tampa Division.

Dated: May 8, 1996

Respectfully submitted

EGLER, GARRET & EGLER

By: /s/_____

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CERTIFICATE OF SERVICE

I hereby certify that, on May 8 , 1996, true and correct copies of the above and foregoing Motion to Transfer were served by hand delivery on:

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Attorneys for Plaintiffs

and by first-class mail, postage prepaid, on:

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Attorneys for Defendant
Metropolitan Life Insurance
Company

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE THE METROPOLITAN LIFE INSURANCE COMPANY SALES PRACTICES LITIGATION	Misc. Docket No. 96-179 MDL No. 1091
THIS DOCUMENT RELATES TO:	
COULTER v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-0629	Judge Lancaster Magistrate Judge Benson
and	
ROSTEK v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-1108	

MOTION TO TRANSFER
UNDER 28 U.S.C. § 1404(a)

Defendant Metropolitan Life Insurance Company ("MetLife") hereby moves under 28 U.S.C. § 1404 (a) to transfer the actions captioned *Coulter v. Metropolitan Life Insurance Company,* No. 94-0629, and *Rostek v. Metropolitan Life Insurance Company,* No. 94-1108, to the United States District Court for the Middle District of Florida, Tampa Division, where the Honorable Steven D. Merryday has retained continuing jurisdiction over a

nationwide class action settlement, *Horton v. Metropolitan Life Insurance Company*, Civ. No. 93-1849-CIV-T-23A, in which certain named plaintiffs and putative class members in the *Coulter and Rostek* cases are settlement class members.

The *Horton* court has issued an order permanently enjoining all *Horton* settlement class members and their attorneys and representatives from litigating in any other forum any claims that were or could have been asserted in the *Horton* case. A transfer would avoid interference with the *Horton* court's exercise of continuing jurisdiction and would honor the terms of that court's permanent injunction order. Once the Florida federal court has resolved issues relating to *Horton class* membership and the scope of the permanent injunction order, the cases may be transferrable back to this Court.

As grounds for this motion, MetLife states as follows:

1. The *Horton* class action was filed in the United States District Court for the Middle District of Florida, Tampa Division, on November 1, 1993.

2. On April 22, 1994, after the parties reached a

proposed settlement, the Horton court certified a nationwide settlement class consisting of:

> all person who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993.

[4/22/94 Order on Class Certification ¶ 1 (Ex. A to accompanying memorandum of law).]

3. On October 25, 1994, the *Horton* court entered an order and Final Judgment in the *Horton* case approving the proposed settlement of that action and dismissing all class members' claims on the merits and with prejudice.

4. On November 8, 1995, the *Horton* court entered an Order Granting Permanent Injunction. This order permanently enjoins all *Horton* class members and their attorneys from litigating *Horton*-related claims in any forum other than the United States District Court for the Middle District of Florida, Tampa Division.

The order states, in part:

> To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action. [11/8/95 Order, ¶ 6 (Ex. F to accompanying memorandum of law).]

5. The *Coulter* action was filed on or about March 25, 1994, almost five months after the *Horton* case commenced. The Coulter Complaint, as amended, lists 15 named plaintiffs and purports to assert claims on behalf of a putative "class" and "subclass." The putative "subclass" consists of:

> all Pennsylvania residents who purchased from [MetLifel a "50/50 Savings Plan," a "State Street Wealth Accumulation Plan," an "Individual Retirement Benefit Plan," a "Nurse's Insured Retirement Plan," a "Nurse's Guaranteed Retirement Plan," a "Tax Advantaged Bonus Plan," an "Enricher Insured Savings Plan," and/or any retirement and/or savings plan, which each [*sic*] was purported to have life insurance "components," but which in reality were [*sic*] nothing more than life insurance policies. [Second

Amended Complaint ¶ 35.]

The Complaint alleges that MetLife "intentionally sold policies of life insurance as a retirement and/or savings plan for the insured, with a life insurance component, to consumers that were interested in purchasing a savings plan and/or a retirement plan, not life insurance. The customers did not get what they had bargained for." [*Id.* ¶ 43.]

6. The *Rostek* case was filed on or about June 30, 1994, some three months later, by the same attorneys who had filed the Coulter action. The Complaint, as apparently amended by the subsequent motion for class certification, purports to assert claims on behalf of five named plaintiffs and a putative class consisting of:

> All Pennsylvania residents who have purchased "college savings plans," which in reality were only large MetLife life insurance policies on children under eighteen years of age, in an amount in excess of $10,000.00." [Proposed Order, ¶ 1.]

Like the *Coulter* Complaint, the *Rostek* Complaint charges that MetLife "intentionally sold life insurance policies as a college savings plan to consumers that were interested in purchasing a

college savings plan for their child, not life insurance. The customers did not get what they had bargained for." [Complaint ¶ 4.]

7. As these proposed class definitions and claims demonstrate, certain named plaintiffs and putative class members in the *Coulter and Rostek* cases are members of the *Horton* settlement class because (*i*) they purchased MetLife whole life insurance policies during the *Horton* class period, (*ii*) they claim to have purchased their life insurance policies as retirement and/or other savings plans or vehicles, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that those plans were life insurance products, and (*iii*) they did not exclude themselves from the certified Horton settlement class.[10]

8. To the extent that certain named plaintiffs and

---

[10] The *Coulter* plaintiffs allege that the "subclass" in that case includes "thousands of person." [Complaint ¶ 44.] MetLife therefore assumes that the "subclass" includes persons who were members of the *Horton* class but did not file timely exclusion requests, because only 97 Pennsylvania residents timely excluded themselves from the *Horton* class.

putative class members in the *Coulter and Rostek* cases fall within the *Horton* settlement class, their claims are barred by res judicata under the Final Judgment entered in the *Horton* case, and the *Horton* court's permanent injunction order enjoins them from continuing to litigate these actions in this Court. Any remedy those plaintiffs could have against MetLife now lies with the Horton court in Florida.

9. MetLife therefore moves to transfer the Coulter *and Rostek* cases to the United States District Court for the Middle District of Florida, Tampa Division, under 28 U.S.C. § 1404(a). That court has retained jurisdiction to enforce the *Horton* settlement, and it is best situated to determine what relief - if any - is available to the plaintiffs and putative class members who fall within the *Horton* class. Moreover, those plaintiffs - as well as their attorneys and purported representatives in these cases would violate the *Horton* court's permanent injunction if they were to continue litigating in this Court. The interests of justice and judicial efficiency thus support: transferring the cases to the Florida federal court under § 1404 (a).

10. The principle of comity, which requires courts of coordinate jurisdiction and equal rank to avoid interfering in each other's affairs, also requires a transfer to the Middle District of Florida. The *Horton* court expressly retained jurisdiction to resolve the issues raised by the plaintiffs' cases as well as all other matters relating to the administration of the class action settlement, and it has enjoined prosecution of related claims in other forums.

11. Four other federal District Judges have transferred six other cases filed by *Horton* class members to Judge Merryday in Florida, recognizing that the *Horton* court was best suited to resolve all *Horton*-related issues in those actions. [*See* Exs. 0, P, Q, R to accompanying memorandum of law.] MetLife respectfully submits that a transfer is appropriate here for the same reasons.

12. The pendency of the consolidated multidistrict litigation in this Court does not preclude at least a temporary transfer to the *Horton* court. The Judicial Panel on Multidistrict Litigation frequently declines to consolidate cases that have proceeded to judgment (as have the *Horton* case and the claims of *Horton* settlement class members) or are otherwise far advanced.

Similarly, the Panel frequently transfers settlement class members' individual cases to the court that has approved a class action settlement (as the *Horton* court has done).

13. In support of this motion, MetLife is submitting a memorandum of law.

WHEREFORE, MetLife respectfully asks the Court to transfer the *Coulter and Rostek* actions under 28 U.S.C. 5 1404(a) to the Honorable Steven D. Merryday, of the United States District Court for the Middle District of Florida, Tampa Division.

Respectfully submitted

/s/

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Attorneys for Defendant
Metropolitan Life Insurance
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Dated: March 23, 1996

CERTIFICATE OF SERVICE

I hereby certify that, on March 28, 1996, true and correct copies of the above and foregoing Motion to Transfer was served upon the following counsel in the manner indicated:

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/s/
Jack Cobetto

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DOUGLAS A. SMITH,

Plaintiff, Civil Action No. 96-453

v.

METROPOLITAN LIFE INSURANCE COMPANY and JEFFREY J. RODGERS,

Defendants.

DOUGLAS A. SMITH,

Plaintiff,

V.

ROBERT MARTINI,

Defendant.

MOTION TO TRANSFER
UNDER 28 U.S.C. § 1404(a)

Defendant Metropolitan Life Insurance Company ("MetLife") hereby moves under 28 U.S.C. § 1404(a) to transfer this action to the United States District Court for the Middle

District of Florida, Tampa Division, where the Honorable Steven D. Merryday has retained continuing jurisdiction over a nationwide class action settlement, *Horton v. Metropolitan Life Insurance Company*, Civ. No. 93-1849CV-T-23A, in which plaintiff Douglas A. Smith is a settlement class member.

The Horton court has issued an order permanently enjoining all *Horton* class members and their attorneys from litigating in any other forum any claims that were or could have been asserted in the *Horton* case. A transfer would avoid interference with the *Horton* court's exercise of continuing jurisdiction and would honor the terms of that court's permanent injunction order.

As grounds for this motion, MetLife states as follows:

1. The *Horton* class action was filed in the United States District Court for the Middle District of Florida, Tampa Division, on November 1, 1993.

2. On October 25, 1994, the federal court in Florida entered an order and Final Judgment in the *Horton* case approving the proposed settlement of that action and dismissing all class

members' claims on the merits and with prejudice.

3. On November 8, 1995, the *Horton* court entered an Order Granting Permanent Injunction. This order permanently enjoins all *Horton* class members from litigating *Horton*-related claims in any forum other than the United States District Court for the Middle District of Florida, Tampa Division. The order states, in part:

> To implement its previous Order and Judgment dismissing settlement class members' claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action. [11/8/95 Order, ¶ 6 (Ex. D to accompanying memorandum of law.]

4. Plaintiff Douglas A. Smith is a member of the *Horton* class because (*i*) he purchased a MetLife whole life insurance policy during the *Horton* class period, (*ii*) his claims fall within the *Horton* class definition, and (*iii*) he did not exclude himself from the certified *Horton* settlement class.

5. In October 1995, one year after the *Horton* court entered its order and judgment dismissing class members' claims, plaintiff initiated this action with a writ of summons in the Court of Common Pleas of Allegheny County, Pennsylvania. No Complaint has yet been filed.

6. On February 13, 1996, plaintiff filed a Motion to Consolidate his state-court suit against MetLife and one of the individual defendants with a subsequently filed state-court suit against another individual defendant. This motion made clear for the first time that plaintiff's claims fall within the *Horton* class definition.

7. MetLife timely removed plaintiff's case from the state court to this Court based on federal question jurisdiction: plaintiffs state-court action sought to pursue claims barred by res judicata under the Final Judgment entered in the *Horton* case, and it essentially constituted a collateral attack on the Florida federal court's orders and judgment.

8. The Notice of Removal also noted that the *Horton* court's permanent injunction bars plaintiff and his attorneys from

continuing to litigate this action in this Court or in a Pennsylvania state court. Any remedy that plaintiff could have against defendants now lies with the *Horton* court in Florida.

9. MetLife therefore moves to transfer this case to the United States District Court for the Middle District of Florida, Tampa Division, under 28 U.S.C. § 1404(a), because that court is best situated to determine what relief, if any, is now available to plaintiff. Moreover, plaintiff and his attorneys would violate the *Horton* court's permanent injunction if they were to continue litigating in this Court. The interests of justice and judicial efficiency thus support transferring this case to the Florida federal court under § 1404(a).

10. The principle of comity, which requires courts of coordinate jurisdiction and equal rank to avoid interfering in each other's affairs, also requires that this action be transferred to the Middle District of Florida. The *Horton* court expressly retained jurisdiction to resolve the issues raised by plaintiff's case as well as all other matters relating to the administration of the class action settlement, and it has enjoined prosecution of related claims in

other forums.

11. For the same reasons it removed this case to this Court, MetLife also has removed similar state-court cases filed by other *Horton* settlement class members. Four federal District Judges subsequently transferred six of those cases to Judge Merryday in Florida, recognizing that the *Horton* court was best suited to resolve any remaining issues in those actions. [*See* Exs. H, I, J, K to accompanying memorandum of law.] MetLife respectfully submits that a transfer is appropriate here for the same reasons.

12. In support of this motion, MetLife is submitting a memorandum of law.

WHEREFORE, MetLife respectfully asks the Court to transfer this action under 28 U.S.C. § 1404(a) to the Honorable Steven D. Merryday, of the United States District Court for the Middle District of Florida, Tampa Division.

Dated: March 14, 1996

Respectfully submitted

EGLER, GARRETT & EGLER

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that, on March 14, 1996, true and correct copies of the above and foregoing Motion to Transfer were served upon the following listed persons by hand delivery:

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and by first-class mail, postage prepaid, on:

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By: /s/_____
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Attorneys for Defendant
Metropolitan Life Insurance
Company

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, at al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER GRANTING PERMANENT INJUNCTION

Before the Court is a motion by defendant Metropolitan Life Insurance Company ("MetLife") seeking a permanent injunction under the All-Writs Act, 28 U.S.C. § 1651(a), against Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon, who have filed individual lawsuits against MetLife in Alabama. The motion was fully briefed by all parties and was the subject of a hearing before the Special Master on July 24, 1995. After the hearing, the parties were permitted to make

additional submissions.

Based on the foregoing, and on the Court's overall familiarity with the litigation and settlement of this class action,

IT IS HEREBY ORDERED that:

1. Charles F. Harrison, Jr., Leroy Wayne McGallager, and Sunny Eppes Solomon (collectively, the 'Alabama plaintiffs') are hereby determined to be members of the settlement class previously certified in this action because (*i*) they purchased their MetLife whole life insurance policies from Metlife's Tampa, Florida sales office between January 1, 1988 and October 31, 1993, or from other MetLife sales offices between January 1, 1990 and October 31, 1993, during the class period, (*ii*) they bought their policies as retirement and/or other savings plans or vehicles, based in whole or in part an written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, and (*iii*) they did not timely exclude themselves from the settlement class.

2. This Court previously entered an Order and Final Judgment under Fed. R. Civ. P. 54(b) releasing MetLife and its

officers, directors, employees, agents, representatives, and its predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents and representatives of any or all of them (collectively, "MetLife and its Affiliates"), from any and all claims or cause of action that (*i*) have been or could have been asserted in this action or (*ii*) have been, could have been, may be or could be alleged by any settlement class member against MetLife and its Affiliates on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, described or referred to in this action or that are related to sales solicitations described in the Second Amended Complaint in this action (the 'Sales Solicitations") or the purchase of Whole Life Policies (defined as policies designed by MetLife as Whole Life, Life Paid Up at 95 or Life Paid Up at 98), including without limitation any and all claims for damages, rescission, equitable and legal relief, attorneys, fees, costs or disbursements incurred by any

person or entity in connection with or related in any manner to this action, the settlement thereof, the administration of this settlement, the Sales Solicitations or the purchase of Whole Life Policies; provided, however, that nothing in that prior Order was intended to bar any action to enforce the parties' Settlement Agreement in accordance with its terms.

3. The Court also dismissed all claims of plaintiffs and settlement class members on the merits and with prejudice, and it retained jurisdiction to administer the settlement and enforce its orders and Judgment.

4. Based an its prior Orders and Judgment, the Court hereby determines that the Alabama plaintiffs' claims have been discharged and dismissed with prejudice and on the merits and that the Court's rulings are res judicata as to those claims.

5. The Alabama plaintiffs and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, are hereby permanently enjoined from pursuing in the Alabama courts, or any forum other than this Court, any claims that were or could

have been raised in this action, and from taking any further action in the Alabama courts other than filing voluntary notices of dismissal of their individual actions on the merits and with prejudice.

6. To implement its previous order and Judgment dismissing settlement class members, claims with prejudice and on the merits and retaining jurisdiction to enforce the terms of the settlement, the Court hereby enjoins any and all other settlement class members and their agents, attorneys, successors, representatives, heirs and assigns, and all persons in active concert or participation with them and any of them, from pursuing in any forum other than this Court any claims that were or could have been raised in this action.

7. MetLife is hereby ordered to abide by its offer to grant the Alabama plaintiffs the opportunity to apply for the same settlement relief provided to eligible settlement class members, i.e., a refund of net premiums plus interest as specified in the Settlement Agreement, or a MetLife Growth Plus Annuity, notwithstanding the expiration of the claim-filing period. If the

Alabama plaintiffs wish to take advantage of this offer, they must file Proof of Claim Forms in substantially the same form as those previously approved by the Court, not later than 30 days from the date of this Order.

8. The injunctions issued in this order are authorized by the All-Writs Act, 28 U.S.C. § 1651(a), and the Anti-Injunction Act, 28 U.S.C. § 2283, because they are necessary to protect and effectuate this Court's Final Judgement and are necessary in aid of this court's continuing jurisdiction.

IT IS SO ORDERED in Chambers in Tampa, Hillsborough County,

Florida this 8th day of November, 1995.

/s/
Steven 0. Merryday
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

VS. CIV. No. 93-1849-CIV-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING MOTIONS TO INTERVENE AND TO DISMISS NOTICES OF INTENTION TO APPEAR AND OBJECT

Before the Court are the following: (1) a motion to intervene (Docket No. 64) by Julio Gonzalez-Roel, Kevin P. McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes (the "former sales managers"), filed on May 12, 1994; (2) a motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters"), filed on May 23, 1994; and (3) a motion by named plaintiffs Sherry Horton, Joyce Armbruster and Deborah K. Spamer (Docket No. 106) to dismiss the various notices of intention to appear and object to the proposed class

settlement filed by the former sales managers (excluding Mr. Ferrandes) (Docket No. 58), by Kevin J. Daxon ("Daxon") (Docket No. 89), and by Daniel Richard Urso ("Urso") (Docket No. 94).

These motions were briefed, and affidavits were submitted. The Court heard oral argument at the July 18, 1994 hearing on the fairness of the proposed settlement.[1] Upon consideration of the papers submitted and arguments made, the Court denied the intervention motions and determined that Daxon and Urso do not have standing to object to the proposed settlement.[2] In accordance

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[1]The former sales managers moved for leave to file a reply brief in support of their motion to intervene, and they tendered a proposed reply brief with the motion. (Docket No. 90.) Leave to file a reply brief is granted; the reply brief has been considered by the Court. In addition, plaintiffs moved to supplement their response to the motion to intervene. (Docket No. 108.) This motion also is granted, as ordered below, and the supplemental material has been considered by the Court.

[2] At the July 18 hearing, counsel for the former sales managers (except Mr. Ferrandes) did not assert their clients, alleged standing to raise their previously filed objections. Instead, counsel spoke only on behalf of Daxon. After the Court's bench ruling on Daxon's lack of standing, however, the parties and the former sales managers stipulated on the record that the former sales managers were not settlement class members.

with and in support of the determinations made at the hearing, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Factual Background

1. Plaintiffs' central allegation in this case is that they and other members of the settlement class purchased whole life insurance policies issued by Metropolitan Life Insurance Company ("MetLife") as retirement and/or other savings plans or vehicles as a result of written or other sales solicitations that allegedly did not fully disclose that the product being sold was life insurance.

2. The complaint in this action was filed in November 1993 and was widely publicized in the press, particularly in the Tampa Bay area.

3. In April 1994, plaintiffs and MetLife agreed to a proposed settlement of this action and entered into a Settlement Agreement.

4. On April 22, 1994, this Court issued its Order with respect to Class Certification, Notice, and Settlement Hearing (Docket No. 48), certifying a settlement class consisting of:

all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from

(a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or

(b) any other sales office of MetLife between January 1, 1990 and October 31, 1993.

5. The April 22 Order also approved forms of individual and publication notice and a proof of claim form. The proof of claim form required settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.)

The Coulters

14. The Coulters are the named plaintiffs in an action originally filed on or about March 25, 1994, in the Court of Common Pleas of Allegheny County, Pennsylvania, but now pending after removal in the United States District Court for theWestern District of Pennsylvania, Civil Action No. 94-0629. (Their complaint is attached as Exhibit 2 to Docket No. 77.)

15. The Coulters' Pennsylvania action asserts, inter alia, claims on behalf of a putative "subclass" of Pennsylvania residents who allegedly were solicited to purchase MetLife whole life insurance policies as savings and/or retirement plans. These allegations are substantially the same as those asserted by plaintiffs in this action.

16. The Coulters did not file a proposed complaint with their intervention motion, as required by P2d. R. Civ. P. 24(c). Instead, they sought to have "all Pennsylvania residents . . . severed [from this action] and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action" against MetLife. Alternatively, the Coulters asked

"that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law." (Docket No. 77, at 1-2.)

17. The Coulters have not yet moved for class certification in Pennsylvania. Nor have they sought to have their attorney appointed as class counsel. MetLife has filed a motion to dismiss the Coulters' amended complaint, and that motion is pending before the federal district court in Pennsylvania.

18. As of June 8, 1994, approximately 800 Pennsylvania settlement class members had filed proofs of claim, even though the deadline for filing was not until June 30, 1994.

19. The Coulters asserted that, in January or February 1993, they purchased a MetLife whole life insurance policy that allegedly had been represented as a retirement or savings plan. (Pennsylvania Complaint ¶ 30-36.) They also claimed they purchased the insurance in part on the basis of sales solicitations that allegedly "failed to disclose that the solicitation was intended to propose insurance . . . . 11 (Id. ¶ 31-32.) These allegations place the Coulters, as individuals, within the settlement class certified by this Court.

Timing of Intervention Motions

20. Before the former sales managers and the Coulters filed their intervention motions on May 12 and 23, respectively, plaintiffs and MetLife had already entered into a settlement agreement, and this Court had preliminarily approved that agreement as sufficiently reasonable, adequate and fair to warrant notice to members of the settlement class. Following entry of the Court's April 22, 1994 Order granting preliminary approval, individual notice and claim forms were mailed to approximately 71,000 potential settlement class members, and notice was published in newspapers and magazines with a combined circulation in excess of 7 million. (Docket No. 144, 149.)

CONCLUSIONS OF LAW

Intervention as of Right

21. Absent an express statutory right to intervene (which the would-be intervenors do not assert), an applicant may not intervene as of right under Fed. R. Civ. P. 24(a) (2) unless:

(1) the application to intervene is timely; (2) the

> applicant has an interest relating to the property or transaction which is the subject of the action; (3) the applicant is so situated that the disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) the applicant's interest will not be represented adequately by the existing parties to the suit.

ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1321 (11th Cir. 1990).

22. An applicant must meet all four criteria to intervene under Rule 24(a)(2). Id.; accord Washington Elec. Corp., Inc. v. Massachusetts Mun. Wholesale Elec., Co., 922 F.2d 92, 96 (2d Cir. 1990). The Court has considered each of the four factors as follows.

The Coulters

42. The Court next considers the four Rule 24(a)(2) requirements in connection with the Coulters' motion to intervene.

43. Interest and Impairment of Interest: Because the Coulters are settlement class members, they have a legally protectable interest in the subject of this action. This Court's April 22, 1994 Order, however, allowed the Coulters -- and any other dissatisfied Pennsylvania residents within the settlement class -- to

opt out of the settlement class and litigate elsewhere if they chose to do so. Thus, the Coulters and other Pennsylvania residents cannot claim that the disposition of this action would unduly impede or impair their interests if intervention were denied. See, e.g., Roberts v. Heim, [1989] Fed. Sec. L. Rep. (CCH) 1 94,394, at 92,555 (N.D. Cal. Mar. 30, 1989) (denying intervention to class members because they "can exercise their right to opt out . . . and thereby avoid being bound by the judgment"); Alaniz v. California Processors, Inc., 73 F.R.D. 269, 289 (N.D. Cal. 1976) (same).

44. In the alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. See Fed. R. Civ- P. 23(c)(2)(c). The Coulters appeared through their own attorney at the fairness hearing.

45. As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights. See, e. g., Webcor Elec.

Inc. v. Whiting, 101 F.R.D. 461, 466 (D. Del. 1984) (denying intervention to shareholders because they could object at fairness hearing); Officers for Justice v. Civil Serv. Comm'n, 473 F. Supp. 901, 829-30 (N.D. Cal. 1979) (denying intervention to class members who had opportunity to object at fairness hearing), aff'd, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Alaniz v. California Processors Inc., 73 F.R.D. 289, 295 (N.D. Cal. 1976), aff'd sub nom. Alaniz v. Tillie Louis Foods, 572 F.2d 657 (9th Cir.), cert. denied, 439 U.S. 837 (1978).

46. **Adequacy of Presentation:** The Court also rejects the Coulters' argument that plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles.

47. Nor can the Coulters justify their motion by arguing that their claims are factually and legally distinct from those in this action and that Rule 23(a)'s requirements of commonality, typicality and adequacy of representation are not satisfied as to the

putative subclass they allege. These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements "may be more easily satisfied in the settlement context than in the more complex litigation context." Dalkon Shield Claimants Comm. v. Aetna Cas. & Sur. Co. (In re A.H. Robins Co.), 85 B.R. 373, 378 (E.D. Va. 1988), aff'd, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989); see also Bowling v. Pfizer, Inc., 143 F.R.D. 141, 157-58 (S.D. Ohio 1992).

48. Timeliness: The Court questions whether the Coulters' intervention motion is timely under the factors articulated in Reeves, 754 F.2d at 968-69. The Coulters filed their Pennsylvania action on or about March 25, 1994; they therefore knew of their claims before that date. Moreover, in light of the extensive national publicity that this case and MetLife's sales solicitations received, the Coulters quite likely knew or should have known about this action when they filed their Pennsylvania suit. Yet the Coulters did not move to intervene here until May 23 -- well after the Court had preliminarily approved the proposed settlement and individual notice had been mailed to potential settlement class.

49. The Court need not decide, however, whether the Coulters' intervention motion was timely because the motion fails to satisfy two of the other four Rule 24(a)(2) requirements: impairment of interest and inadequacy of representation. As discussed above, a prospective intervenor must meet all four of those requirements to intervene as of right. ManaSota-88, Inc., 896 F.2d at 1321; accord Washington Elec. Coop., Inc., 922 F.2d at 96. In addition, denial of intervention would in no way prejudice the Coulters because (i) they had an opportunity to exclude themselves from the settlement class or object to the proposed settlement and (ii) they actually entered an appearance in this case.

50. The Court therefore concludes that the Coulters cannot intervene as of right because they have not met Rule 24(a)(2)'s requirements. Moreover, their motion is defective for several other reasons.

51. **Asserted Right to Represent Other Pennsylvania Residents**: The Coulters' attempt to exclude all Pennsylvania residents from the settlement class is improper. Just as the Coulters had the right to participate in or opt out of the settlement

class, so did every other settlement class member who resides in Pennsylvania. The Coulters have no authority unilaterally to make that decision for all other Pennsylvania settlement class members. See 3 Herbert B. Newberg & Alba Conte, Newberg on Class Actions § 16.16 at 16-90 (3d ed. 1992) ("The decision to exercise the right of exclusion in a Rule 23(b)(3) action is an individual decision of each class member and may not be usurped by the class representative or class counsel") (emphasis added). The type of group or mass opt-out that the Coulters seek therefore is improper -- especially where so many Pennsylvania residents already have filed claim forms expressing their desire to participate in the proposed settlement. See, e. g., Carlough v. Amchem Prods., Inc., 10 F.3d 189, 203-04 (3d Cir. 1993) (discussing class members' right to opt out only on an individual basis, and noting that "a mass opting out . . . clearly would be disruptive to the district court's ongoing settlement management").

52. The Coulters' attempt to "sever" or exclude all Pennsylvania residents from the settlement class also is particularly inappropriate because the Coulters have not been determined to be

adequate representatives of the absent Pennsylvania members of the settlement class (or of any other putative class); nor have their attorneys been found to be adequate class counsel. The Coulters therefore have no right to speak for the putative subclass they allege or to force the putative subclass members' withdrawal from the settlement class certified in this action.

53. **Due Process:** The Coulters' claim that this Court's application of Florida law to Pennsylvania residents would violate due process is unfounded. The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement -- an issue controlled by federal law governing settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of law principles. In addition, if the Coulters and other Pennsylvania residents believed that Pennsylvania law gave them a greater potential recovery than would be available to other settlement class members, they could have excluded themselves from the settlement

class.

54. **Procedural Defect**: Intervention also is denied because the Coulters did not attach a pleading as required by Rule 24(c) "setting forth the claim or defense for which intervention is sought." The failure to attach a pleading is especially significant here because the Coulters do not even attempt to assert a claim or defense; rather, they seek to intervene so they can "sever" themselves and all other Pennsylvania residents from the case.

Permissive Intervention

55. Where an applicant may not intervene as of right under Rule 24(a)(2), the Court nevertheless has discretion to permit intervention under Rule 24(b)(2) if the application is timely and if

> an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b)(2); see, e.g., ManaScota-88, Inc., 896 F.2d at 1323.

56. "[I]t is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a

common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention." Worlds, 929 F.2d at 595 (quotations omitted).

The Coulters

64. As discussed above, the Coulters' intervention motion might be untimely. But more importantly, the procedures adopted by the Court for potential class members to object or exclude themselves from the settlement class already offer the Coulters all the relief they seek for themselves and other Pennsylvania settlement class members. granting permissive intervention thus would serve no purpose where the would-be intervenors wish only to "sever" themselves from the action and already have the right to do so. (As discussed above, however, the Coulters' unilateral attempt to "sever" other Pennsylvania settlement class members is improper.)

In Tampa, Florida, on October 25th, 1994.

/s/
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD S. COULTER and
ANISSA COULTER, his wife,
Residents of Pennsylvania,
on behalf of themselves and
all other persons similarly
situated,

Plaintiffs, Civil Action No. 94-0629

v.

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER OF COURT

AND NOW, this 23rd day of September, 1994, upon consideration of Plaintiffs' Motion for Leave to Amend Class Action Complaint (Document No. 21) and Defendant's Motion to Stay Proceedings Pending Ruling on Proposed Settlement (Document No. 11), it is hereby ORDERED that:

1. Plaintiffs' Motion for Leave to Amend Class Action Complaint (Document No. 21) is GRANTED. The Complaint shall

be filed on or before October 24, 1994.

2. Defendant shall answer or otherwise plead in response to the Second Amended Complaint on or before November 23, 1994.

3. Defendant's Motion to Stay Proceedings Pending Ruling on Proposed Settlement (Document No. 11) is GRANTED. Except for the filing and service of the Second Amended Complaint and any response thereto, all matters in this action are stayed pending disposition of all proceedings involving Plaintiffs in the case currently pending in the United States District Court, Middle District of Florida, Tampa Division, captioned Horton v. Metropolitan Life Insurance Company, C.A. No. 93-1849-CIV-T-23A.

/s/
Donald J. Lee
United States District Judge

cc: Kenneth R. Behrend
Behrend & Ernsberger
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONALD S. COULTER, and ANISSA COULTER, his wife, TAMMI BAZY, MICHELLE BLUM, BETH RAIBLE, SHELLEY DAUGHENBAUGH, FRIEDA KAMEL, PATRICIA FREY, CHRISTOPHER CLANCY, JOYCE MCCANDLESS, DIANA JOHNSON, ROBERT HEMCHER, GERALD DEARMITT, and ADA DEARMITT, his wife, and ANGELO RECUPERO, Residents of Pennsylvania, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

CIVIL DIVISION
NO: 94-0629

SECOND AMENDED CLASS ACTION COMPLAINT

SECOND AMENDED CLASS ACTION COMPLAINT

AND NOW, come the Plaintiffs, Ronald S. Coulter, and Anissa Coulter, his wife, Tammi Bazy, Michelle Blum, Beth Raible, Shelley Daughenbaugh, Frieda Kamel, Patricia Frey, DeArmitt, and Ada DeArmitt, his wife, and Angelo Recupero, by

and through their attorney, Kenneth R. Behrend, and the Law Firm of Behrend and Ernsberger and file the following Second Amended Class Action Complaint in Civil Action, stating the following:

THE PARTIES

1. Representative Plaintiff, Ronald S. Coulter, is an individual who is a resident of Pennsylvania and at all times material hereto resided in Butler, PA. Ronald Coulter was the owner and the named insured of MetLife whole life insurance policy number 935 000 470 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

2. Anissa Coulter, wife of Ronald S. Coulter is an individual who is a resident of Pennsylvania and at all times material hereto resided in Butler, PA. Anissa Coulter was the intended beneficiary of MetLife whole life insurance policy number 935 000 470 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

3. Representative Plaintiff Tammi Bazy is an individual who is a resident of Pennsylvania and at all times

material hereto resided in Glenshaw, PA. Tammi Bazy is the owner and the named insured of MetLife whole life policy number 935 303 601 PR, which contains language which was not approved by the Pennsylvania Insurance Commission.

4. Representative Plaintiff Michelle Blum is an individual who is a resident of Pennsylvania and at all times material hereto resided in Pittsburgh, PA. Michelle Blum is the owner and the named insured of MetLife whole life policy number 935 205 686 PR, which contains language which was not approved by the Pennsylvania Insurance Commission.

5. Representative Plaintiff Beth Raible is an individual who is a resident of Pennsylvania and at all times material hereto resided in Glenshaw, PA. Beth Raible is the owner and the named insured of MetLife whole life policy number 925 608 831 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

6. Representative Plaintiff Shelley Daughenbaugh is an individual who is a resident of Pennsylvania and at all times material hereto resided in Mechanicsburg, PA. Shelley

Daughenbaugh is the owner and the named insured of MetLife whole life insurance policy number 934 901 403 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

7. Representative Plaintiff Frieda Kamel is an individual who is a resident of Pennsylvania and at all times material hereto resided in Pittsburgh, PA. Frieda Kamel is the owner and the named insured of MetLife Life 95 life policy number 915 908 135 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

8. Representative Plaintiff Patricia Frey is an individual who is a resident of Pennsylvania and at all times material hereto resided in Allison Park, PA. Patricia Frey is the owner and the named insured of MetLife Flexible Premium Life policy number 903 143 699 UL, and MetLife Flexible Premium Multifunded Life policy number 935 404 879 UM, both of which contain language which was not approved by the Pennsylvania Insurance Commission.

9. Representative Plaintiff Christopher Clancy is an

individual who is a resident of Pennsylvania and at all times material hereto resided in Carnegie, PA. Christopher Clancy is the owner and the named insured of MetLife Life 98 whole life policy number 925 206 290 E1.

10. Representative Plaintiff Joyce McCandless is an individual who is a resident of Pennsylvania and at all times material hereto resided in Butler, PA. Joyce McCandless is the owner and the named insured of MetLife Flexible Premium Multifunded Life policy number 935 601 492 UM, which contains language which was not approved by the Pennsylvania Insurance Commission.

11. Representative Plaintiff Diana Johnson is an individual who is a resident of Pennsylvania and at all times material hereto resided in Bethel Park, PA. Diana Johnson is the owner and the named insured of Whole Life policy number 916 003 683 PR, which contains language which was not approved by the Pennsylvania Insurance Commission.

12. Representative Plaintiff Robert Hemcher is an individual who is a resident of Pennsylvania and at all times

material hereto resided in Pittsburgh, PA. Robert Hemcher is the owner and the named insured of Life 95 policy number 925 903 820 PR, and Whole Life policy number 935 701 768 PR, both of which contain language which was not approved by the Pennsylvania Insurance Commission.

13. Representative Plaintiffs Gerald DeArmitt, and Ada DeArmitt, his wife, are individuals who are residents of Pennsylvania and at all times material hereto resided in Butler, PA. Gerald and Ada DeArmitt are the named insureds of MetLife Survivorship Whole Life policy 916 001 790 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

14. Representative Plaintiff Angelo Recupero is an individual who is a resident of Pennsylvania and at all times material hereto resided in Kittanning, PA. Angelo Recupero is the owner and the named insured of MetLife whole life policy number 935 903 035 A, which contains language which was not approved by the Pennsylvania Insurance Commission.

15. Defendant, Metropolitan Life Insurance Company,

(MetLife), is an insurance company licensed in the Commonwealth of Pennsylvania to sell life insurance, with offices throughout Pennsylvania and an administrative office located at 500 Schoolhouse Road, Johnstown, PA 15904-1097 and with corporate headquarters at 1 Madison Avenue, New York, NY 10010.

CLASS ACTION ALLEGATIONS

16. This class action is brought on behalf of all of the Pennsylvania residents who purchased from MetLife Insurance Company (hereinafter "MetLife"), life insurance policies or annuities which said policies or contracts covering life insurance or annuities were not formally approved by the Pennsylvania Insurance Commissioner.

17. The policies or contracts covering life insurance or annuities which were not formally approved by the Pennsylvania Insurance Commissioner, include, but are not limited to the following:

A. Whole Life Policy (7-87) and Life to 95 (57-87)

issued after June 12, 1991, which did not contain the approved policy language that provided consumers notice that: "you may ask us to pay premiums with a combination of yearly dividends, the cash value to any paid-up additions and/or any dividend accumulations. As long as these values are great enough, out-of-pocket premiums need not be paid to keep your policy in force."; and

B. Survivorship Whole Life Policy (2j-90 PA) containing unapproved language on page one (1), concerning Supplemental Insurance Benefit and Split Policy Option, that were issued subsequent to October 23, 1990; and

C. Flexible Premium Life Insurance Policy (7UL-90) which contained the limited, unapproved, disclosure language on the Policy Specification Page that :"The Planned Premium shown below may need to be increased to keep this policy and coverage in force.". MetLife did not include the Insurance Commission's required additional disclosure language: "Even if coverage continues, the amount payable on the final date of policy may have little or no value."; and

D. Multifunded Flexible Premium Life Policy (7.6FM-90), which contained additional Insurance Commission unapproved policy language on pages 1, 3, 3.1, and 5; and

E. All life and annuity policy forms which contained unapproved non-guaranteed illustrated value tables bound in with the policy pages.

18. Common questions of law and fact affect the rights of each member of the class and a common relief by way of damages for the Plaintiff class is sought.

19. Among the predominating common questions of fact and law with reference to the Representative and class Plaintiffs are:

A. Did MetLife's sale of the above referenced policies or annuities in paragraph 16, violate Sections 201-2(4) (ii), (v), (vii), (ix), (xiv) and (xvii) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

B. Whether MetLife's sale of insurance and annuities as set forth in this complaint that were not approved by the Commonwealth of Pennsylvania's Insurance Commission,

violated Sections 201-2(4) (ii), (v), (vii), (xiv) and (xvii) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

C. Whether MetLife and its agents had knowledge of the scheme to sell unapproved policies or annuities to Pennsylvania consumers?

D. Whether MetLife and its agents exercised good faith and fair dealing in the performance of its contractual obligations to the purchasers of the unapproved policies and/or annuities as set forth above?

E. Whether MetLife and its agents violated their fiduciary duty towards the purchasers of the unapproved policies and/or annuities as set forth above, by not informing them directly that the policies and/or annuities were not approved by the Pennsylvania Insurance Commission and that they were required to first get the approval of the Pennsylvania Insurance Commission, prior to selling the policy and/or annuity?

F. Whether MetLife and its agents were under a duty to inform the purchasers of the unapproved policies and/or

annuities as set forth above, that they were required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policy and/or annuity?

G. Whether MetLife negligently supervised its insurance agents?

20. The Representative Plaintiffs will assure the adequate representation of all members of the class, and have no conflict with the class members in the maintenance of this class action. The Representative Plaintiffs' claims are not only typical, but virtually identical to the claims of the class members. They have had no relationship with MetLife except as insureds and are aware that they cannot settle their actions without Court approval. Their interests in this action are antagonistic to the interests of MetLife and they will vigorously pursue the claims of the Class.

21. The Representative Plaintiffs have the financial resources to litigate this action. Moreover, Plaintiffs' undersigned counsel has agreed to assist in the payment of all reasonable and necessary costs to litigate this action.

22. Retained counsel, Behrend and Ernsberger, are

experienced in litigating class actions and have handled class actions in this Court for and on behalf of other Representative Plaintiffs. Counsel are handling this case on a contingent basis and will receive compensation for their professional services only as awarded by this Court.

23. A class action provides a fair and efficient method of adjudicating the controversy set forth in the class. The substantive claims of the Representative and Class Plaintiffs are virtually identical and will require evidentiary proof of the same kind and application of the same law. Since MetLife has treated all Class members in a similar and/or identical manner, equitable and declaratory relief is appropriate with respect to the Class.

24. Representative Plaintiffs believe and therefore aver that there are no unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the class fund will be minimized. Individual actions, as a result of the doctrine of stare decisis, could substantially impair the rights of the purported Class

members and an inconsistent adjudication would require MetLife to treat similarly and/or identically treated Class members, differently.

25. Having met the requirement for certification as a class, Plaintiffs respectfully request that this class be certified.

COUNT I

CLASS CLAIMS FOR VIOLATION OF THE UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW

26. Paragraphs 1 through 25 are hereby incorporated by reference as if set forth fully at length herein.

27. The Plaintiffs purchased the above described insurance policy and suffered an ascertainable loss of money as a result of the use or employment by the defendants of a method, act or practice declared unlawful under the Fair Trade, and Business Practices Act found at 73 P.S. sec. 201-1 et seq. In particular, but not limited to:

a. The Defendant, MetLife, through its agents, servants and/or employees, caused a likelihood of confusion or of

misunderstanding to the approval or certification of the goods or services, in that they knowingly, falsely and fraudulently did not inform the Plaintiffs that the insurance policies and/or annuities above described were not approved and/or certified by the Pennsylvania Insurance Commission and that MetLife was required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policies and/or annuities in the Commonwealth of Pennsylvania, (201-2 (4) (ii));

b. The Defendant through its agents, servants and/or employees, represented that the goods or services provided had approval, and characteristics that they did not have in that MetLife represented that they would deal with the Plaintiffs fairly, honestly and in good faith, when in fact they did not, in that they failed to inform the Plaintiffs that the insurance policies and/or annuities that they sold were not approved by the Pennsylvania Insurance Commission and that they were required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policy and/or annuity, (201-2 (4) (v));

c. The Defendant, MetLife, through its agents,

servants and/or employees, represented that the services that would be provided were of a particular standard, quality or grade, when in fact they were of another, in that the Defendant, through its agents, servants and/or employees, represented that they were licensed insurance professionals and therefore skilled in selling insurance, that MetLife would deal with the Plaintiffs as their insurance agent in a fiduciary capacity of honesty, diligence and fair dealing, when in fact MetLife through its agents, servants and/or employees did not, and therefore the services did not rise to the level required of an insurance company through its agents, servants and/or employees, as licensed insurance professionals, insurance agents and in the fiduciary/agency capacity of honesty, diligence and fair dealing, (201-2 (4) (vii));

d. The Defendant, MetLife, through its agents, servants and/or employees, engaged in fraudulent conduct which created a likelihood of confusion and misunderstanding with the Plaintiffs in that they knowingly, falsely and fraudulently did not inform the Plaintiffs that the insurance policies and/or annuities above described were not approved by the Pennsylvania Insurance

Commission and that MetLife was required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policies and/or annuities to the Plaintiffs, (201-2 (4) (xvii);

WHEREFORE, the Plaintiffs demand judgment against the Defendant, Metropolitan Life Insurance Company for compensatory damages pursuant to 73 P.S. sec. 209-2 and in an amount in excess of $25,000.00, statutory treble damages, plus interest, costs, attorneys fees and demand exemplary or punitive damages in addition to the compensatory damages, and any other such relief that the court deems necessary or proper.

COUNT II

CLAIMS OF COMMON LAW FRAUD - DECEIT BY CONCEALMENT AGAINST METLIFE

28. The averments of Paragraphs 1 through 27 are incorporated.

29. MetLife had a duty to refrain from selling the insurance policies and/or annuities above described, which were not

approved and/or certified by the Pennsylvania Insurance Commission, for which MetLife was required to first get the approval of the Pennsylvania Insurance Commission prior to selling the policies and/or annuities in the Commonwealth of Pennsylvania.

30. MetLife concealed from the purchasers of the insurance policies and/or annuities that the policies contained language which was unapproved by the Pennsylvania Insurance Commission.

31. The MetLife Account Representatives' omission to advise that the polices were illegal was material in plaintiffs decision to purchase the policies and/or annuities from MetLife.

32. MetLife and/or its agents knew, or in reckless disregard for the truth, should have known, that the product being sold was unapproved by the Pennsylvania Insurance Commission and illegal.

33. Representative and Class Plaintiffs purchased insurance policies and/or annuities from MetLife in detrimental reliance upon the omission of the MetLife Account representatives

to advise that the policies and/or annuities contained language unapproved by the Pennsylvania Insurance Commission.

34. Representative and Class Plaintiffs were damaged by MetLife's schemes, as described above, because the omission to advise that the policies contained language unapproved by the Pennsylvania Insurance Commission, and the sale thereof, resulted in Plaintiffs' spending money on an illegal product, and thereby deprives Plaintiffs of their money that they wanted to deposit into an approved insurance policy and/or annuity.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

SUB-CLASS ALLEGATIONS

35. This sub-class portion of the class action is brought

as a class action pursuant to Pa. R. Civ. Pro. Sect. 1702 on behalf of all Pennsylvania residents who purchased from Metropolitan Life Insurance Company ("MetLife") a "50/50 Savings Plan", a "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Advantaged Bonus Plan", an "Enricher Insured Savings Plan", and/or any retirement and/or savings plan, which each was purported to have life insurance "components", but which in reality were nothing more than life insurance policies. The purchase of the life insurance deprived the purchasers from the financial returns that could be received from a true investment vehicle, in comparison to the charges and commissions which are taken from the consumer to pay for a life insurance policy.

36. MetLife was offering one product (the retirement/ investment plans set forth in the paragraph above), and selling another (a life insurance policy). Selling life insurance policies as a retirement plan and not solely as life insurance is in MetLife's and its' agents economic interest, since the commissions earned and

the fees charged, would not otherwise come to MetLife, if it had been explained to the consumer and sold only as life insurance.

37. MetLife was on notice that the sale of life insurance as a retirement, investment, and/or savings plan and not as life insurance is improper, at the time that the Representative and Class Plaintiffs were sold their retirement/savings plans. (See exhibit 1.)

38. Robert Crimmins, the head of MetLife's Personal Insurance Unit, was aware by 1990 of the use of unauthorized nurses' retirement literature, and advocated "stern controls" for its cessation. (See exhibit 2.)

39. In January of 1990, Patrick Hunt, manager of MetLife Personal Insurance Contracts Bureau, was notified by the Texas state Board of Insurance that the sale of life insurance as a "Nurse's Retirement Savings Plan" was improper and misleading, and violated provisions in Texas law, similar to provisions in Pennsylvania law, which prohibit representing that life insurance is anything other than life insurance. (See exhibit 1.)

40. In January 1991, Roy Bertke, manager of Public

and Consumer Affairs at the MetLife South East Home Office in Tampa, Florida, wrote to Rick Urso, a Florida agent, and stated that a nursing retirement plan brochure "misleads people, [and is] a violation of insurance laws in every state". (See exhibit 3.)

41. By April of 1991, Harold J. Harrison, National Marketing Director of MetLife Resources, stated that he was aware that the nurses' retirement literature had been circulated in the past, and stated that it was improper because it did not disclose that it proposed the sale of life insurance. (See exhibit 4.)

42. Upon information and belief, Plaintiffs allege that MetLife knew, or should have known, in reckless disregard to the truth or falsity thereof, that MetLife Pennsylvania Account Representatives' marketing and sale of life insurance as a retirement, investment, and/or savings plan on the insured, was fraudulent and/or deceptive.

43. Plaintiffs allege that MetLife engaged in a statewide scheme, whereby MetLife intentionally sold policies of life insurance as a retirement and/or savings plan for the insured, with a life insurance component, to consumers that were interested

in purchasing a savings plan and/or a retirement plan, not life insurance. The customers did not get what they had bargained for. They lost money, when they thought they had "deposited" money into a retirement/savings plan for themselves.

44. The class is believed to include thousands of persons, and is, therefore, so numerous as to make it impracticable to bring all members of the respective sub-class before the Court. The exact number of sub-class members is unknown to Representative plaintiffs, but is believed to be ascertainable from records maintained by MetLife.

45. The advertising and marketing of this retirement/savings plan down played the mention of life insurance, even though the sale's objective was to sell life insurance. The advertising materials used promoted retirement or savings plans on the consumer with heavy emphasis on "savings" and "deposits" and that the plan had a life insurance component or death benefit. These marketing plans had the capacity to mislead consumers into purchasing life insurance under the false presumption they were purchasing a retirement and/or savings plan for themselves, that

also had a life insurance component.

46. MetLife's scheme injured the economic interests of the consumers that purchased the savings plan and/or retirement plan, at the same time that it promoted and enriched the economic interests of MetLife and its agents.

47. Common questions of law and fact affect the rights of each member of the sub-class and a common relief by way of damages for the Plaintiff sub-class is sought.

48. Among the predominating common questions of fact and law with reference to the Representative and Sub-Class Plaintiffs are:

A. Did they purchase the "50/50 Savings Plan", a "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan on themselves, with a life insurance component, when in fact it was only a life insurance policy on themselves?

B. Whether MetLife knew that its agents were

selling whole life, life insurance as the "50/50 Savings Plan", a "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan?

C. Whether MetLife knew with respect to the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan, that it was not in their economic and/or financial interest to purchase the above plans for themselves?

D. Whether MetLife's sale of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a

retirement and/or savings plans as set forth in this complaint, violated Sections 201-2(4) (ii), (v), (vii), (ix) and (xiv) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

E. Whether MetLife's sale of insurance as a "retirement", "investment", and/or "savings" plan, as set forth in this complaint, violated Sections 201-2(4) (ii), (v), (vii), (ix) and (xiv) of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. Sect. 201-2(4)?

F. Whether MetLife and its agents that charged fees and commissions for the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plans breached their fiduciary duty to the purchasers, by not informing them that they were only purchasing life insurance and nothing more?

G. Whether MetLife and its agents were

engaged in a fraudulent sales scheme designed to deprive the purchasers of their money that they were willing to deposit into a savings and/or retirement plan for themselves?

H. Whether MetLife had knowledge of the scheme designed to deprive the purchasers of their money that they were willing to deposit into a savings and/or retirement plan for themselves?

I. Whether MetLife exercised good faith and fair dealing in the performance of its contractual obligations to the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and a retirement and/or savings plan?

J. Whether MetLife and its agents violated its fiduciary duty towards the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan",

"Enricher Insured Savings Plan", and a retirement and/or savings plan by not informing them directly that they had only been sold life insurance on themselves?

K. Whether MetLife was under a duty to inform the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and a retirement and/or savings plan, of the interest and dividend reductions?

L. Whether MetLife's sale of insurance as set forth in this complaint violated The Pennsylvania Bad Faith Insurance Statute 42 Pa.C.S.A. Sect. 8355?

M. Whether MetLife negligently supervised its insurance agents?

49. The Representative Plaintiffs will assure the adequate representation of all members of the sub-class, and have no conflict with the sub-class members in the maintenance of this class action. The Representative Plaintiffs' claims are not only

typical, but virtually identical to the claims of the sub-class members. They have had no relationship with MetLife except as insureds and are aware that he cannot settle their actions without Court approval. Their interests in this action are antagonistic to the interests of MetLife and they will vigorously pursue the claims of the sub-class.

50. A class action provides a fair and efficient method of adjudicating this controversy. The substantive claims of the Representative and Sub-Class Plaintiffs are virtually identical and will require evidentiary proof of the same kind and application of the same law. Since MetLife has treated all Class members in a similar and/or identical manner, equitable and declaratory relief is appropriate with respect to the Class.

51. The Representative Plaintiffs believe and therefore aver that there are no unusual legal or factual issues which would cause management problems not normally and routinely handled in class actions, and because damages may be calculated with mathematical precision, the cost of administering the sub-class fund will be minimized. Individual actions, as a result of the doctrine of

stare decisis, could substantially impair the rights of the purported Sub-Class members and an inconsistent adjudication would require MetLife to treat similarly and/or identically treated Class members, differently.

52. The Plaintiffs seek damages, inter alia, pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-9.2 for violations under section 201-2 (i - xiv) and the Pennsylvania Bad Faith Insurance Statute, 42 Pa.C.S.A. Sect. 8355, for selling a savings plan and or retirement plan, which in fact was only life insurance.

53. Having met the requirement for certification as a sub-class, Plaintiffs respectfully request that this sub-class be certified.

STATEMENT OF "50/50 SAVINGS PLAN"

REPRESENTATIVE PLAINTIFFS' CLAIMS

54. The Representative Plaintiffs received a phone call that they believe and therefore allege, followed the phone script

from the "50/50 Savings Plan" Track Book, which referenced only a Metropolitan savings program, when asking for an appointment. (See Exhibit 5.) (There is also a standard solicitation letter that was sent, see Exhibit 6.)

55. After setting up an appointment, MetLife Account Representatives came to the Plaintiffs' home and sold to the Plaintiffs a "50/50 Savings Plan", that was to be used either as a savings plan, or a retirement plan, which had an insurance component. The retirement/savings plan was "self completing", in that if you should die, before age 65, the death benefit would complete the "program" by paying the death benefit amount to your designated beneficiary.

56. The Account Executives used the Track Book, when they made the presentation of the "50/50 Savings Plan" to the Representative Plaintiffs, by reviewing the contents of the Track Book in the Plaintiffs' presence to aid the Account Executives in the sale with Plaintiffs.

57. The 50/50 Selling Points list (See Exhibit 7) from the 50/50 Plan Track Book failed to disclose that the solicitation

was intended to propose insurance, and emphasizing "savings" and "retirement income" while pointing out that the prospective client could not "rely on Social Security" or their "employer." (See Exhibit 8).

58. The "50/50 Savings Plan" Track Book contained standardized illustrations of the plan by sex and age, for monthly "deposits" of $100.00, showing cash value and monthly income generated at age 65.

59. The "50/50 Savings Plan" was designed to identify an amount of "savings" by the consumer and then apply that amount as equal premium payments into a Whole Life policy and a P.U.A.R. It is believed and therefore alleged that the MetLife agent force, deviated from the equal payments amounts and caused the entire amount to be paid into the Whole Life Policy, with the P.U.A.R. for optional payments. The effect of this deviation was to provide increased commission earnings for MetLife agents and sales managers.

60. A benefits illustration page from the Track Book entitled "Metropolitan 50/50 a plan to provide for your personal

savings" showed the plan as providing investment and savings aspects. (See Exhibit 9.)

61. The Coulters were sold the "50/50 Savings Plan" on or about January 12, 1993 and it was delivered to them on or about February 17, 1993, including a whole life policy number 935 000 470 A, in the face amount of $111,628.00.

62. The monthly "deposit" that was to be made into the Coulters' "50/50 Savings Plan", was $100.00 per month.

63. Shelley Daughenbaugh was sold the "50/50 Savings Plan" on or about January 8, 1993, and it was delivered to her on or about January 15, 1993, including a whole life policy number 934 901 403 A, in the face amount of $63,514.00.

64. The monthly deposit that was to be made into Ms. Daughenbaugh's "50/50 Savings Plan" was $50.00 per month.

65. The "50/50 Savings Plan" was presented to the Representative Plaintiffs in a blue three ringed binder that contained various papers which included: a comparison of the "50/50 savings plan" with an Individual Retirement Account (I.R.A.) and a Certificate of Deposit (C.D.), a mathematical

illustration of the investment vehicle, 50/50 Deposit slips, a copy of a newspaper article from December 17, 1990 USA TODAY which describes the quality of MetLife, in that: "... The quality of Met's investment portfolio is the best of any leading life company ...", and a whole life policy of insurance. (See Exhibits 10 through 16.)

66. The "50/50 Savings Plan" was nothing other than whole life insurance.

67. The Representative Plaintiffs, as part of the "50/50 Savings Plan" were also sold a "Paid Up Additions Insurance Rider", but not informed that if any money was "deposited" in the "P.U.A.R.", that a 5% commission would be deducted from the "deposit".

68. Representative Plaintiffs, and other MetLife "savings plan" and/or "retirement plan" purchasers, had a substantial property interest in the benefits of their "savings plan" and/or "retirement plan".

69. At a date now unknown, but believed to be in the spring of 1991, MetLife and its agents, to increase sales and

premium revenue, developed an insurance financing scheme to deprive Representative Plaintiffs and others of their hard earned money that they wanted to put into a "savings plan" and/or "retirement plan", by MetLife and its agents selling to Representative Plaintiffs and others the "50/50 Savings Plan" as a "savings plan" and/or "retirement plan", with a life insurance component, when it was in reality only a whole life insurance policy.

70. It is believed and therefore alleged that the "50/50 Savings Plan" and/or "Retirement Plan" was introduced to the Account Executives of MetLife by Gary Antonino and Mike George at a Regional meeting of MetLife in the Spring of 1991.

71. MetLife and its agents, along with Gary Antonino and Mike George, to implement this scheme, created a "Track Book" for the Account Executives (agents), so they could more easily sell the "50/50 Savings Plan" by following a prepared sale script. (A "Track Book" is a book that sets forth the sale program in a step-by-step fashion so that the sale agent can easily follow the procedure to sell the product.)

72. Along with the "Track Book", it is believed and therefore alleged that Gary Antonino and Mike George created the format of selling the scheme to Representative Plaintiffs and others in a blue three ringed binder, along with one or all of the following documents contained in the binder in plastic see-through folder pages: a comparison of the "50/50 Savings plan" with an Individual Retirement Account (I.R.A.) and a Certificate of Deposit (C.D.), a mathematical illustration of the investment vehicle, 50/50 Deposit slips, a copy of a newspaper article from December 17, 1990 USA TODAY which describes the quality of MetLife, in that "... The quality of Met's investment portfolio is the best of any leading life company ...", and the whole life policy itself.

73. In furtherance of the deceptive scheme, the presentation of the "50/50 Savings Plan" in the blue binder gave it an "air of authenticity", which was designed as a tool of persuasion to put the purchaser of the plan at ease.

74. The "50/50 Savings Plan" was introduced to the MetLife Account Executives (Agents) by Mike George who was, at all times relevant, the Regional Training Director. (He

subsequently became a Branch Manager in Washington, Pennsylvania and it is believed and alleged that he was directing the agents in the Washington, PA. office to sell the "50/50 Savings Plan and/or "Retirement Plan".)

75. It is believed and therefore alleged, the "50/50 Savings Plan" was endorsed by MetLife officers, Gary Antonino, who was, at all times relevant, the Regional Vice-President and Charles M. Kavitsky, Vice President, Mideastern Territory.

76. It is believed and therefore averred that the Track Book was sold to every MetLife sales agent in western Pennsylvania, as well as it was sold throughout the Commonwealth of Pennsylvania. (MetLife refers to their sales agents as "account representatives", amongst other titles they may obtain.)

77. It is believed and therefore averred that Mr. Antonino and Mr. George received a fee and/or commission on each Track Book that was sold.

78. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of whole life insurance as a "savings plan"

and/or "retirement plan", was in violation of Pennsylvania Insurance Laws, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Bad Faith Insurance Statute, in that it is prohibited to sell life insurance as a "savings plan" and/or "retirement plan".

79. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of whole life insurance as a "savings plan" and/or "retirement plan", was not in the best financial interest of the Plaintiffs, in that the Plaintiffs would have been economically advantaged by investing their money in an actual savings plan as opposed to purchasing whole life insurance. In fact, if the Plaintiffs' money that was placed in the "50/50 Savings Plan" had been placed in a shoe box, after thirteen years time the plaintiff would have more money saved in the shoe box, than he would have saved in the "Guaranteed Cash Value" of the "50/50 Savings Plan".

80. MetLife, and/or it's licensed insurance agents, at all material times, was aware of this insurance scheme, to obtain

commissions through deceptive sales tactics. MetLife knew that the sale of whole life insurance as a "savings plan" and/or "retirement plan" was detrimental to the interests of the Plaintiffs that only wanted a savings plan and/or a retirement plan, not a life insurance policy.

81. Substantial commissions were paid to the Account Executives. It is believed and therefore averred that in the first year the commission earned by an Account Executive is 55% of the payment made by the Plaintiffs.

82. Neither a Certificate of Deposit, nor an Individual Retirement Account, have sales commissions, let alone a sales commission of 55% of the amount deposited, which was charged the Plaintiffs in the "50/50 Savings Plan".

83. The commissions that were charged in the "50/50 Savings Plan" directly depleted any "savings", that were "deposited" in the "savings plan". In fact the "Guaranteed Cash Value" at the end of one year was zero dollars and zero cents ($ 0.00). (See Exhibit 16, page 4 of the Insurance Policy.)

84. It is believed and therefore alleged that MetLife

concealed and continues to conceal that the "50/50 Savings Plan", "savings plan" and/or "retirement plan" is illegal and violates Pennsylvania law.

85. It is believed and therefore alleged that MetLife concealed the fact that the "50/50 Savings Plan", "savings plan" and/or "retirement plan" is not a true savings plan with a life insurance component, but that it is nothing more than a whole life, life insurance policy.

86. Representative and Class Plaintiffs have been damaged by MetLife's concealment of the consequences of the fact that unlike a true retirement/investment and/or savings plan, that if deposits are not continually made into the savings/retirement plan, the premiums for the whole life policy has the potential for the cash value to decrease to the point where there would not be any money left in the policy and the Plaintiff would receive a lapse notice, if they do not pay additional money to MetLife. A true retirement/investment and/or savings plan does not deplete the principal, and in fact increases in value over time.

87. MetLife also concealed from Representative

Plaintiffs and others that had purchased the "50/50 Savings Plan", at all relevant times, the consequences of its post-1991 dividend reductions and that as a result of these reductions the Plaintiffs could eventually lose all of the money that they had "deposited" into the "50/50 Savings Plan".

88. At all times material, MetLife was aware of the scheme to obtain premiums and commissions by selling the "50/50 Savings Plan, "Retirement Plan" and/or "Savings Plan", when in reality all that they were selling was whole life, life insurance.

89. MetLife knew or should have known and in reckless disregard to the Plaintiffs rights:

A. that MetLife agents were selling the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", when in reality all that they were selling was whole life, life insurance; and

B. that the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan" was not in the financial interest of Coulter and the Sub-Class Plaintiffs in light of the fact that they wanted a retirement plan or a savings plan, which comes with little or no risk of losing the capital invested, as opposed to the whole

life insurance which could cause the capital "deposited" into the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", to be depleted to nothing, because of the premium charges for the insurance coverage.

90. During all times material hereto, MetLife perpetrated this same fraudulent insurance sales scheme by selling the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan" to thousands of consumers in Pennsylvania, knowing or in reckless disregard to their rights that the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", could deplete all of the money "deposited" in the same, as well as the fact that it violates Pennsylvania Law to sell life insurance as an investment such as a retirement plan or a savings plan.

91. MetLife concealed and continues to conceal that from the purchasers of the "50/50 Savings Plan", "Retirement Plan" and/or "Savings Plan", that their investments are being depleted and that they could end up with nothing for all of the money that they thought that they were saving, by "depositing" their money into their "50/50 Savings Plan, "Retirement Plan" and/or "Savings

Plan".

92. Representative and Sub-Class Plaintiffs have been damaged by MetLife's concealment of the consequences of its dividend reductions, which in the future, in many if not all of the "50/50 Savings Plans", "Retirement Plans" and/or "Savings Plans", will cause the depletion of all of the money "deposited" into the same.

STATEMENT OF OTHER RETIREMENT PLAN REPRESENTATIVE PLAINTIFFS' CLAIMS

93. Representative Plaintiffs were sold one or more of the following types of retirement and/or savings plans:

a.) Individual Retirement Benefit Plan;

b.) Nurse's Insured Retirement Plan;

c.) Nurse's Guaranteed Retirement Plan;

d.) Tax Favored Retirement Plan;

e.) State Street Wealth Accumulation Plan; and/or

f.) Enricher Insured Savings Plan.

94. Representative Plaintiffs were contacted by MetLife Account Representatives regarding an opportunity to purchase a retirement plan. The objective of this sales solicitation was to sell life insurance and earn a commission on the sale.

95. Although the product being sold was life insurance, in the sales presentation, the MetLife Account Representative emphasized the "savings" and "retirement income" aspects of the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and the retirement and/or savings plan being sold.

96. As part of some plans, such as the State Street Wealth Accumulation Plan, Representative Plaintiffs were to make two equal "monthly investment" payments to MetLife: Part A to pay for an "insured savings", and Part B to pay for a money market investment. The Account Representative explained that Part A was a "type of IRA" that could be used for retirement. In reality, Part A was life insurance.

97. As part of the sales presentation, the Account Representatives showed Representative Plaintiffs several illustrations regarding the return on the money they would be "investing" until age 65. As a result of their investment, they would receive hundreds of thousands of dollars at age 65.

98. The literature which was used as part of the sales presentation to Representative Plaintiffs failed to disclose that the solicitation was intended to propose insurance, instead emphasizing "investment" and "retirement income".

99. The illustration and the sales presentation used by MetLife Account Representatives trumpeted MetLife's excellent financial ratings and investment portfolio. These materials also stated that the product being purchased was for use as a retirement plan, emphasizing the product's growth and tax benefits, as well as the unreliability of social security.

100. It is believed and therefore alleged that the sale of retirement, investment, and/or savings plans which in reality were nothing more than life insurance was endorsed by MetLife officers.

101. MetLife, and/or it's licensed Insurance agents, knew

or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of life insurance as a "savings plan", "investment plan", and/or "retirement plan", as described in this Complaint, was in violation of Pennsylvania Insurance Laws, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Bad Faith Insurance Statute, in that it is prohibited to sell life insurance solely as a "savings plan", "investment plan", and/or "retirement plan".

102. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiffs, that the sale of life insurance as a "savings plan", "investment plan", and/or "retirement plan", was not in the best financial interest of the Plaintiffs, in that the Plaintiffs would have been economically advantaged by investing their money in an actual savings plan as opposed to purchasing life insurance.

103. MetLife, and/or it's licensed Insurance agents, at all material times, were aware of this insurance scheme, to obtain commissions through deceptive sales tactics. MetLife knew or should have known that the sale of life insurance as a "savings

plan", "investment plan", and/or "retirement plan" was detrimental to the interests of the Plaintiffs that only wanted a savings plan, investment plan and/or a retirement plan, not a life insurance policy.

104. Relying to their detriment on representations of MetLife Account Representatives as made to Representative Plaintiffs in their capacity as insurance professionals, Representative Plaintiffs purchased the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and savings and/or retirement plans at times ranging from 1988 through 1993.

105. MetLife concealed and continues to conceal from the purchasers of the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any other "savings", "investment", and/or "retirement" plans that their

"investments" are being depleted and that they could end up with nothing for all of the money that they thought that they were saving, by "depositing" their money into their retirement, investment, and/or savings plan.

106. Representative Plaintiffs have been damaged by MetLife's concealment of the consequences of its dividend reductions, which in the future, in many if not all of the "retirement", "investment", and/or "savings" plans, will cause the depletion of all of the money "deposited" into the same.

107. MetLife knew or should have known but for reckless disregard to the Plaintiffs' rights:

A. that MetLife agents were selling the "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any other "savings", "investment", and/or "retirement" plan, when in reality all that they were selling was life insurance; and

B. that the "State Street Wealth Accumulation Plan",

"Individual Retirement Benefit Plan", "Nurse's Insured Retirement Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any other "savings", "investment", and/or "retirement" plan were not in the financial interest of Representative Plaintiffs, in light of the fact that they wanted a retirement, investment, and/or savings plan for themselves, which comes with little or no risk of losing the capital invested, as opposed to life insurance which could cause the capital "deposited" into the "retirement", "investment" and/or "savings" plans to be depleted to zero, to pay for the insurance coverage.

STATEMENT OF PLAINTIFFS' CLAIMS WHICH FALL OUTSIDE OF HORTON SETTLEMENT CLASS DEADLINE

108. Representative Plaintiff was contacted by MetLife Account Representatives regarding an opportunity to purchase a retirement plan. The objective of this sales solicitation was to sell life insurance and earn a commission on the sale.

109. Although the product being sold was life insurance,

in the sales presentation, the MetLife Account Representative emphasized the "savings" and "retirement income" aspects of the product being sold.

110. The Account Executives used the Track Book, when they made the presentation of the "retirement plan" to the Representative Plaintiff, by reviewing the contents of the Track Book in the Plaintiff's presence to aid the Account Executives in the sale with Plaintiff.

111. The sales solicitation failed to disclose that the solicitation was intended to propose insurance, and instead emphasized "savings" and "retirement income".

112. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Representative Plaintiff, that the sale of whole life insurance as a "savings plan" and/or "retirement plan", was in violation of Pennsylvania Insurance Laws, the Pennsylvania Unfair Trade Practices and Consumer Protection Law, and Bad Faith Insurance Statute, in that it is prohibited to sell life insurance as a "savings plan" and/or "retirement plan".

113. MetLife, and/or it's licensed insurance agents, knew or should have known, in reckless disregard of the rights of the Plaintiff, that the sale of whole life insurance as a "savings plan" and/or "retirement plan", was not in the best financial interest of the Plaintiff, in that the Plaintiff would have been economically advantaged by investing his money in an actual savings plan as opposed to purchasing whole life insurance. In fact, if the Plaintiff's money that was placed in the "retirement plan" had been placed in a shoe box, after thirteen years time the Plaintiff would have more money saved in the shoe box, than he would have saved in the "Guaranteed Cash Value" of his "retirement plan".

114. MetLife, and/or it's licensed insurance agents, at all material times, was aware of this insurance scheme, to obtain commissions through deceptive sales tactics. MetLife knew that the sale of life insurance as a "savings plan" and/or "retirement plan" was detrimental to the interests of the Plaintiff that only wanted a savings plan and/or a retirement plan, not a life insurance policy.

115. Substantial commissions were paid to the Account

Executives. It is believed and therefore averred that in the first year the commission earned by an Account Executive is 55% of the payment made by the Plaintiff.

116. Neither a Certificate of Deposit, nor an Individual Retirement Account, have sales commissions, let alone a sales commission of 55% of the amount deposited, which was charged the Plaintiff in the "retirement plan".

117. The commissions that were charged to the Representative Plaintiff's "retirement plan" directly depleted any "savings", that were "deposited" in the "retirement plan". In fact the "Guaranteed Cash Value" at the end of one year was zero dollars and zero cents.

118. It is believed and therefore alleged that MetLife concealed and continues to conceal that the "retirement plan", and/or "savings plan" is illegal and violates Pennsylvania law.

119. It is believed and therefore alleged that MetLife concealed the fact that the "retirement plan", "savings plan" and/or "retirement plan" which was sold to Representative Plaintiff is not a true savings plan with a life insurance component, but that it is

nothing more than a life insurance policy.

120. Representative Plaintiff has been damaged by MetLife's concealment of the consequences of the fact that unlike a true retirement/investment and/or savings plan, that if deposits are not continually made into the savings/retirement plan, the premiums paid for the life insurance policy has the potential for the cash value to decrease to the point where there would not be any money left in the policy and the Plaintiff would receive a lapse notice, if they do not pay additional money to MetLife. A true retirement/investment and/or savings plan does not deplete the principal, and in fact increases in value over time.

121. MetLife also concealed from Representative Plaintiffs and others that had purchased a "retirement plan", at all relevant times, the consequences of its post-1991 dividend reductions and that as a result of these reductions the Plaintiff could eventually lose all of the money that he had "deposited" into the "retirement plan".

122. At all times material, MetLife was aware of the scheme to obtain premiums and commissions by selling the

"retirement plan", and/or a "savings plan", when in reality all that they were selling was life insurance.

123. Mr. Recupero was sold the "retirement plan" on or about November 4, 1993 and it was delivered to him on or about December 8, 1993, including a whole life policy number 935 903 035 A, in the face amount of $27,835.00.

124. The monthly "deposit" that was to be made into Mr. Recupero's "retirement plan", was $30.00 per month.

125. MetLife, and/or it's licensed Insurance agents, at all material times, were aware of this insurance scheme, to obtain commissions through deceptive sales tactics. MetLife knew or should have known that the sale of life insurance as a "savings plan", "investment plan", and/or "retirement plan" was detrimental to the interests of the Plaintiffs that only wanted a savings plan, investment plan and/or a retirement plan, not a life insurance policy.

126. Relying to his detriment on representations of MetLife Account Representatives as made to Representative Plaintiff in their capacity as insurance professionals, Representative

Plaintiff purchased the "retirement plan".

127. MetLife concealed and continues to conceal from the purchasers of a "retirement", "savings", and/or "investment", plan that their "investments" are being depleted and that they could end up with nothing for all of the money that they thought that they were saving, by "depositing" their money into their retirement, investment, and/or savings plan.

128. Representative Plaintiff has been damaged by MetLife's concealment of the consequences of its dividend reductions, which in the future, in many if not all of the "retirement", "investment", and/or "savings" plans, will cause the depletion of all of the money "deposited" into the same.

129. MetLife knew or should have known but for reckless disregard to the Plaintiff's rights:

A. that MetLife agents were selling a "retirement", "savings", and/or "investment" plan, when in reality all that they were selling was life insurance; and

B. that the "retirement", "savings", and/or "investment" plan" plans were not in the financial interest of Representative

Plaintiff, in light of the fact that he wanted a retirement, investment, and/or savings plan for himself, which comes with little or no risk of losing the capital invested, as opposed to life insurance which could cause the capital "deposited" into the "retirement", "investment" and/or "savings" plans to be depleted to zero, to pay for the insurance coverage.

130. Representative Plaintiff's claims mirror that of the "50/50 Savings Plan" and other "retirement" and/or "savings" plans as set forth in this Complaint, and the same or similar types of fraud have been perpetrated upon Representative Plaintiff, who purchased a "retirement", "investment", and or "savings" plan which in reality was only life insurance.

131. Representative Plaintiff purchased a "retirement" and/or "savings" plan prior to January 1, 1990, the specified start date for the time frame (January 1, 1990 through October 31, 1993) chosen by MetLife for its nationwide notification to individuals who purchased a "retirement" plan which was in reality life insurance.

132. Accordingly, Representative Plaintiff was not

notified of his potential claim as were those who purchased a "retirement" plan between January 1, 1990 and October 31, 1993, who received notification of their potential claims from MetLife.

133. MetLife's exclusion of the class of plaintiffs who purchased fraudulently sold "retirement", "investment", and/or "savings" plans outside of the January 1, 1990 through October 31, 1993 time frame, is arbitrary and unfair.

COUNT III

CLAIMS FOR VIOLATION OF THE CONSUMER PROTECTION ACT

134. The averments of Paragraphs 1 through 133 are incorporated.

135. The conduct of MetLife and its agents described herein constitutes violations of Sections 201-2(4) (ii), (v), (vii), (ix) and (xiv) of the Pennsylvania Unfair Trade And Consumer Protection Law ("Consumer Protection Law"), and caused Plaintiffs to suffer an ascertainable loss of money as a result of the use or employment by the defendant of a method, act or practice declared

unlawful under the Consumer Protection Law, in particular, but not limited to:

a. The Defendant, MetLife, through its agents, servants and/or employees, caused a likelihood of confusion or of misunderstanding as to the approval or certification of the goods or services, in that they knowingly, falsely and fraudulently sold the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement and/or savings plan which each was purported to have a life insurance "component", when in fact it was only life insurance, (201-2 (4) (ii));

b. The Defendant through its agents, servants and/or employees, represented that the goods or services provided had approval and characteristics that they did not have in that MetLife represented that they would deal with the Plaintiffs fairly, honestly and in good faith, when in fact they did not, in that they failed to inform the Plaintiffs that the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit

Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any "retirement", "investment", and/or "savings" plan which each was purported to have a life insurance "component", were in fact only life insurance, (201-2 (4) (v));

c. The Defendant, MetLife, through its agents, servants and/or employees, represented that the services that would be provided were of a particular standard, quality or grade, when in fact they were of another, in that the Defendant, through its agents, servants and/or employees, represented that they were licensed insurance professionals and therefore skilled in selling insurance, that MetLife would deal with the Plaintiffs as their insurance agent in a fiduciary capacity of honesty, diligence and fair dealing, when in fact MetLife through its agents, servants and/or employees did not, and therefore the services did not rise to the level required of an insurance company through its agents, servants and/or employees, as licensed insurance professionals, insurance agents and in the fiduciary/agency capacity of honesty, diligence and fair dealing, (201-2 (4) (vii));

d. The Defendant, MetLife, through its agents, servants and/or employees, engaged in fraudulent conduct which created a likelihood of confusion and misunderstanding with the Plaintiffs in that they knowingly, falsely and fraudulently did not inform the Plaintiffs that the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement plan which each was purported to have a life insurance "component", was in fact only life insurance,

(201-2 (4) (xvii);

136. MetLife has violated the above quoted sections of the Consumer Protection Law by selling and charging for insurance in schemes that concealed from Plaintiffs that:

A. they were not purchasing a "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Retirement Plan", a "Tax Favored Retirement

Plan", "Enricher Insured Savings Plan", and/or any "retirement", "investment", and/or "savings" plan, but were only purchasing a life insurance policy; and/or

B. they were being charged a 55% commission and fees for a savings and/or retirement plan; and/or

C. they could lose the money that they "deposited" into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any "retirement", "investment", and/or "savings" plan, by the depletion of the deposits through payment for the life insurance.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated, request that this Court declare that MetLife has violated the Consumer Protection Law and to award damages in the excess of $25,000, triple damages pursuant, and attorneys' fees, costs and expenses and any other relief this Court deems necessary and proper.

COUNT IV

CLAIMS FOR BREACH OF FIDUCIARY

DUTY BY METLIFE

137. The averments of Paragraphs 1 through 136 are incorporated.

138. MetLife and its licensed insurance agents, owes or owed fiduciary duties to the Representative and Class Plaintiffs who purchased the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a

"Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement plan from MetLife.

139. MetLife and its licensed insurance agents held themselves out to the Representative and Class Plaintiffs as insurance professionals, with a high degree of skill and expertise in the insurance industry.

140. MetLife Account Representatives bolstered their credibility with insurance consumers by distributing business cards and letterhead with such professional qualifications as "Registered Representative" and "Financial Planner".

141. The qualifications advertised by the MetLife Account Representatives reasonably and justifiably caused the Representative and Class Plaintiffs to repose their trust in the recommendations and advice of the Account Representatives.

142. As a result of placing their trust in MetLife and/or its Account Representatives, the Representative and Class Plaintiffs were harmed, in that they lost money, when they intended to save money by placing it into a "retirement", "investment", and/or

"savings" plan with MetLife.

143. MetLife and its licensed insurance agents have breached its fiduciary duties to the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and/or any retirement plan from MetLife by selling and charging them for life insurance, when the purchasers thought that they were purchasing a retirement and/or a savings plan, that had an insurance component as an added incentive to the retirement and/or savings as alleged in this Complaint and by failing to timely advise them of the consequences of their dividend and interest reductions, which would deplete all of the "deposits".

144. The Representative and Class Plaintiffs have been damaged by MetLife's breach of its fiduciary duties and have lost or will lose in whole or part the money that they had invested into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed

Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and/or any retirement plan from MetLife, as well as the interest that they would have earned thereon.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000 against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

COUNT V

CLAIMS FOR METLIFE'S BREACH OF
THE DUTY OF GOOD FAITH AND FAIR DEALING

145. The averments of Paragraphs 1 through 144 are incorporated.

146. Representative Plaintiffs entered into and fully performed all of their obligations under their "retirement",

"investment", and/or "savings" plan contracts with MetLife, by making "deposits" into the contracts.

147. By reason of the "retirement", "investment", and/or "savings" contracts, and in accordance with the provisions thereof, Representative Plaintiffs are entitled to all rights and benefits thereunder.

148. MetLife, through its agents, undertook the handling and processing of Representative Plaintiffs' "benefits" pursuant to their contracts.

149. At all times material, Representative Plaintiffs were not represented by counsel, and MetLife and/or its agents represented to and assured Representative Plaintiffs that they would receive "retirement", "investment", and or "savings" benefits pursuant to their contracts.

150. Representative Plaintiffs reasonably relied entirely on the advice of MetLife and/or its agents regarding the nature and extent of the benefits which were owed to them under their "retirement", "investment", and/or "savings" plan contracts. MetLife and/or its agents knew or should have known, in reckless

disregard for the rights of Representative Plaintiffs, that Plaintiffs reasonably relied upon their advice, and that they lacked independent representation.

151. At all times material and by reason of the MetLife "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Insured Retirement Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", an "Enricher Insured Savings Plan", and a retirement and/or savings plan, and life insurance policies purchased by the Representative and Class Plaintiffs, MetLife and/or its agents are charged with a duty of good faith and fair dealing regarding its determination of entitlement and payment of "retirement", "investment", and/or "savings" benefits under their contracts. This duty included, among others, the duty on the part of MetLife and/or its agents to pay or to advise Plaintiffs as to any and all benefits to which Plaintiffs are entitled pursuant to their contracts.

152. By virtue of the nature of the contracts, and in their capacity as insurance professionals, MetLife and/or its agents

occupied the position of a fiduciary regarding the determination of entitlement and payment "retirement", "investment", and/or "savings" benefits thereunder.

153. The conduct of MetLife and/or its agents in engaging in a scheme to deprive Representative and Class Plaintiffs of the benefits they would have received from a true or real investment of a saving and/or retirement plan (such as a Certificate of Deposit or an Individual Retirement Account) by selling and charging them for life insurance as alleged in this Complaint constituted a breach of its implied duty of good faith and fair dealing.

154. MetLife also breached a duty of good faith and fair dealing by failing to timely advise the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan of the consequences to them of its dividend and interest reductions, which causes the depletion of the monies "deposited".

155. The Representative and Class Plaintiffs have been damaged as a result of MetLife's breach and continuing breach of its implied contractual duty of good faith and fair dealing and have lost in whole the money that they "deposited" into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated requests compensatory damages in excess of $25,000 against MetLife, an award of interest, costs and expenses and such other relief as this Court deems just and proper.

COUNT VI

CLAIMS OF COMMON LAW FRAUD - DECEIT BY CONCEALMENT AGAINST METLIFE

156. The averments of Paragraphs 1 through 155 are

incorporated.

157. MetLife had a duty to refrain from selling the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan, when in reality all that was sold was life insurance, and from charging Plaintiffs for the insurance in the manner alleged in this Complaint, since said selling schemes deprives Plaintiffs of their money that they wanted to deposit into a savings and/or retirement plan.

158. MetLife concealed from the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", an "Individual Retirement Benefit Plan", a "Nurse's Guaranteed Retirement Plan", a "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan:

A. That they were being only being sold and charged for life insurance;

B. That it was not in their economic interest to purchase and pay for the life insurance as a savings, investment, and/or retirement plan; and/or

C. The consequences of its dividend/interest reductions on their existing payments insofar as maintaining their savings and/or retirement plan.

159. The MetLife Account Representatives' omission of the actual nature of the product being old was material in plaintiffs decision to purchase a "retirement", "investment", and/or "savings" plan from MetLife.

160. MetLife and/or its agents knew, or in reckless disregard for the truth, should have known, that the product being sold was only life insurance.

161. Representative and Class Plaintiffs purchased a "retirement", "investment", and/or "savings" plan from MetLife in detrimental reliance upon the representations of the MetLife Account representatives.

162. Representative and Class Plaintiffs were damaged by MetLife's schemes, as described above, because the selling scheme deprives Plaintiffs of their money that they wanted to deposit into a savings and/or retirement plan.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

COUNT VII

CLAIMS FOR NEGLIGENT SUPERVISION

163. The averments of Paragraphs 1 through 162 are incorporated.

164. The sale of life insurance as described in this Complaint is within the scope of the MetLife Account Representatives' employment.

165. MetLife Account Representatives purported to act and/or speak on behalf of MetLife when they sold the "retirement", "investment", and/or "savings" plans as described in this Complaint.

166. MetLife had a duty to adequately supervise its insurance agents by protecting the purchasers of their product from unscrupulous conduct and/or improper sales tactics.

167. MetLife had a duty to institute appropriate safeguards so that the purchasers of the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan, were informed by the sale agents (account representatives), that they were only being sold life insurance instead of a savings and/or retirement plan.

168. MetLife knowingly, recklessly and/or negligently failed and/or refused to adequately supervise its insurance agents in the sale of the "retirement", "investment", and/or "savings" plans, to the Representative Plaintiffs and the Class, and instructed,

encouraged or otherwise knowingly allowed its agents to carry out the insurance schemes alleged in this Complaint.

169. MetLife and its agents and managers ratified the actions of MetLife Account Representatives by failing to adequately control or supervise them in their sale of insurance.

170. MetLife is liable for the actions of its Account Representatives, as set forth in this Complaint, in that MetLife knew or should have known that these improper sales tactics were taking place.

171. MetLife's knowing, reckless or negligent supervision of its agents and employees resulted in substantial financial harm to Representative Plaintiffs and the Class.

172. MetLife carried out this scheme willfully, wantonly and with reckless disregard for the rights and interests of the Representative and Class Plaintiffs causing them to lose in whole or part their hard earned money which was "deposited" into the "50/50 Savings Plan", "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher

Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest, attorneys fees, costs and expenses and such other relief as this Court deems just and proper.

COUNT VIII

BREACH OF CONTRACT

173. The averments of Paragraphs 1 through 172 are incorporated.

174. MetLife and its agents and/or employees offered to provide Representative and Class Plaintiffs with retirement, investment, and/or savings plans, as set forth in this Complaint.

175. Representative and Class Plaintiffs accepted MetLife's offer to purchase a "retirement", "investment", and/or "savings" contract.

176. Representative and Class Plaintiffs purchased the product being offered for sale by MetLife Account Representatives because they believed that they would be saving and/or investing money for their retirement, as based upon the representations and illustrations offered by MetLife Account Representatives.

177. As consideration for their retirement, investment, and/or savings plan contracts, Representative and Class Plaintiffs made initial and monthly "deposits" into their contracts.

178. In reality, MetLife and or its agents and/or employees were selling only life insurance.

179. MetLife fraudulently concealed the fact that all that was being sold to Representative and Class plaintiffs was life insurance, not a retirement, investment, and or savings plan.

180. Had Representative and Class Plaintiffs been aware that all that was being sold was life insurance, they would not have entered a "retirement", "investment" and/or "savings" contract with MetLife.

181. Representative and Class Plaintiffs are entitled to the full complement of benefits which were promised to them

pursuant to the "retirement", "investment", and/or "savings" contracts which they entered with MetLife, on the basis of the illustrations and representations of MetLife's Account Representatives.

182. Representative and Class Plaintiffs seek damages based upon the contracts which they entered with MetLife, in addition to any and all other relief that may be available to them.

RELIEF

Wherefore, Representative and Class Plaintiffs, on behalf of themselves and all others similarly situated request that they receive the full complement of benefits which they were offered pursuant to the retirement, investment, and/or savings plan contracts entered with MetLife.

COUNT IX

BAD FAITH BREACH OF CONTRACT AGAINST METLIFE

183. The averments of Paragraphs 1 through 182 are

incorporated.

184. The Defendant MetLife, through its agents, servants and/or employees, who are licensed insurance professionals, sold "50/50 Savings Plans", a "State Street Wealth Accumulation Plan", "Individual Retirement Benefit Plan", "Nurse's Guaranteed Retirement Plan", "Tax Favored Retirement Plan", "Enricher Insured Savings Plan", and or any other MetLife "retirement" and/or "savings" plan to Pennsylvania citizens, including Representative Plaintiffs, under the guise of selling a retirement and/or savings plan with a life insurance component.

185. It is believed and therefore alleged that MetLife and its agents knew or should have known, in reckless disregard of the rights of the sub-class Plaintiffs, that it was misleading, confusing, deceptive and fraudulent, to sell a retirement and/or savings plan with a life insurance component, when in fact it was only a life insurance policy and nothing more.

186. MetLife through its agents, servants, and/or employees, had the Representative Plaintiffs sign an application form, (which was prepared and filled in by the account executive)

and had them pay an initial "deposit" to initiate the retirement and/or savings plans.

187. MetLife through its agents, servants, and/or employees, subsequently delivered to the sub-class Plaintiffs the retirement/savings program, which also contained a whole life insurance policy. The documents that were delivered, with the whole life policy, comprised the retirement/savings plan contracts. (See e.g., exhibits attached to the Complaint for copies of the documents that comprised the "50/50 Savings Plan".)

188. The said retirement/savings plan contracts were entered into by the Representative Plaintiffs by the signing of the application form in good faith and was an acceptance by the Plaintiff of the retirement/savings plans, as explained by the Account Executive and confirmed in writing by the documents given to the Representative Plaintiffs, as described above.

189. While entering into the retirement/savings plan contracts and collecting payments thereon, MetLife fraudulently, willfully, wantonly and in bad faith, failed to inform the Representative Plaintiffs that all that they were purchasing was a

life insurance policy, not a retirement/savings plan.

190. MetLife falsely and fraudulently misled the Representative Plaintiffs into believing that they were depositing money into a retirement/savings plan, when in fact it was only a life insurance policy.

191. The Representative Plaintiffs, as a result of the misrepresentations of MetLife, and its agents, not knowing the truth or falsity regarding them, but believing them to be true, relied upon the misrepresentations to their detriment.

192. MetLife fraudulently, recklessly, wilfully and wantonly and in bad faith breached the terms of the retirement/savings plan, and in fact is not honoring the terms and conditions of the retirement and/or savings programs.

193. Representative Plaintiffs seek relief from MetLife's bad faith acts under the Pennsylvania statute 42 Pa. C.S. Section 8371, in addition to any and all other relief that may be available to them.

RELIEF

Wherefore, Representative Plaintiffs, on behalf of

themselves and all others similarly situated request compensatory and punitive damages in excess of $25,000, against MetLife, an award of interest from the date that the claim was made in the amount equal to the prime rate plus 3%, attorneys fees, costs and expenses and such other relief as this Court deems necessary, just and proper.

JURY DEMAND

Representative Plaintiffs, individually and on behalf of the class they represent, request a trial by jury on all counts of this Complaint.

Respectfully Submitted,
BEHREND AND ERNSBERGER

By /s/

Kenneth R. Behrend
PA I.D. #37961
2400 Grant Building
Pittsburgh, PA 15219
(412) 391-2515

DATED: AUGUST 16, 1994

CERTIFICATE OF SERVICE

I, Kenneth R. Behrend, hereby certify that a true and correct copy of the within Amended Class Action Complaint was served this 16th day of August, 1994 upon the following by United States mail, first class, postage prepaid, addressed as follows:

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Jack B. Cobetto, Esq
Robert D. Anderle, Esq
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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
CIVIL ACTION NO. 93-1849-CIV-T-23A

SHERRY HORTON
1732 Cone Street
Toledo, OH 43606

JOYCE ARMBRUSTER
Oakwood Drive
Largo, FL 34640

PLAINTIFFS

vs.

METROPOLITAN LIFE INSURANCE COMPANY
DEFENDANTS
SERVE:
STUART NAGLER
An Officer and managing Agent
One Madison Avenue
New York, NY 10010

RICK URSO
2826 Morrison Avenue
Tampa, FL 33609

INTERVENOR'S (PENNSYLVANIA COULTER CLASS) MOTION FOR INTERVENTION

Pursuant to Fed.R.Civ.P. 24, Ronald and Anissa Coulter, representatives of the class of Pennsylvania residents (Intervenors) similarly injured by the Metropolitan Life Insurance Company's (hereinafter MetLife) insurance practices,

respectfully requests that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class Representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. if the Court does not permit severance, in the alternative, the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

1. Ronald and Anissa Coulter are Pennsylvania residents who purchased a "50/50 Savings Plan" in Pennsylvania from a MetLife agent based in Butler, Pennsylvania. The 50/50 Savings Plan" was allegedly a retirement plan with a life insurance component. In reality, it was whole life, life insurance.

2. The "50/50 Savings Plan", as it was presented and sold to consumers in Pennsylvania, was never presented to the Pennsylvania insurance Department, and accordingly was not approved by the Pennsylvania Insurance Department.

3. The "50/50 Savings Plan" did not contain disclosure language to the effect that the plan, because it was comprised

only of whole life insurance, was not an investment or savings plan.

4. Disclosure language stating that life insurance is not an investment or savings plan is required by the Pennsylvania Insurance Department. 40 Pennsylvania Statute section 277; 40 Pennsylvania Statute section 472.

5. The Pennsylvania Insurance Department specifically undertook an investigation of MetLife's sales practices in Pennsylvania and issued a lengthy and detailed report of its findings. See Report of Market Conduct Examination of the Metropolitan Life Insurance Company, December 23, 1993, at pp. 3839; 58; 71-72; 96-97; 155-160 (exhibit 1). The Insurance Department's effort in this regard is unequivocal evidence of its concern that Pennsylvania residents be protected from the fraudulent insurance practices detailed in the Report.[3]

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[3] The Coulters respectfully request that this Court take judicial notice of the Pennsylvania Insurance Department's Report and will provide a copy of the Report in its entirety if the Court so desires.

6. The Coulters, as representatives of all those persons similarly injured in Pennsylvania, brought a class action suit in state court, pursuant to statutory and common law of Pennsylvania (see Amended Coulter Complaint, exhibit 2), on behalf of Pennsylvania citizens injured by MetLife's failure to have the life insurance Policies Properly approved by the Pennsylvania Insurance Department Prior to selling the same, as well as MetLife's failure to effectuate disclosure as is required by the Pennsylvania Insurance Department and other fraudulent insurance practices. (See exhibit 1, at pp. 155-160.)

7. The Pennsylvania Consumer Protection Law allows for a private cause of action against insurance companies and sets forth that it is a violation to sell or represent that a good or service has approval which it does not have.

8. The Coulter Class, complaint also includes a sub-class of Pennsylvania residents who purchased MetLife life insurance which MetLife agents represent ad to be a retirement or savings plan with a life insurance component, which is also an alleged

violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law("CPL"). 73 Pennsylvania Statute 201-2, as well as the Pennsylvania Unfair Insurance Practices Act, 40 Pennsylvania Statute section 277, and is a violation of the Pennsylvania Bad Faith Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371.

9. Ronald and Anissa Coulter also filed a Class Action Complaint in the Court of Common Pleas of Allegheny County, on May 18, 1994, against individual defendants Michael George, former MetLife Training Director, and Gary Antonino, former MetLife Regional Vice-President, who formulated the "50/50 Savings Plan" scheme in Pennsylvania. The Class in that case is comprised of Pennsylvania residents who purchased MetLife life insurance, which, at the direction of Michael George and Gary Antonino, was represented by MetLife agents to be a retirement or savings plan with a life insurance component. This misrepresentation is an alleged violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pennsylvania Statute section 201-2; the Pennsylvania Bad Faith

Insurance Statute, 42 Pennsylvania Code Statutes Annotated section 8371; and the Pennsylvania Insurance Department Act, 40 Pennsylvania Statutes section 277. The claims in class action against Michael George and Gary Antonino are based upon the identical transactions and occurrences as in the earlier filed class action.

10. The Coulter Class and sub-class members, all of whom executed contracts of insurance in Pennsylvania and were injured in Pennsylvania, are entitled to the application of Pennsylvania law to their causes of action. Any practice to the contrary is a denial of due process to the Coulter class and sub-class. Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985). In Phillips Petroleum, the United States Supreme Court declared that the application of Kansas law in a class action to claims which did not arise in Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits". Id. at 822.

11. Representative Coulter is a steel worker. The remainder of the class is constituted of those who purchased retirement plans with a life insurance component from MetLife and is not

limited to any particular profession or occupation.

12. In contrast, the Horton class action represents "primarily . . . licensed nurses . . . [and other health care professionals]" (Horton Class Action Complaint, 4/22/94, at pph. 19), who purchased MetLife life insurance which they each believed to a retirement or savings plan as a result of MetLife's agents' representations. (Horton Class Action Complaint at pph. 8.)

13. The Coulter class and sub-class seek relief on the basis of the Pennsylvania CPL, 73 Pennsylvania Statute section 201-1 et seq., the Pennsylvania Bad Faith Insurance Law, 42 Pennsylvania Code Statutes Annotated section 8371, and Pennsylvania fraud and contract law.

14. The Pennsylvania CPL empowers the Pennsylvania Attorney General to adopt such rules and regulations as may be necessary to protect Pennsylvania residents from fraud and unfair or deceptive business practices. A Pennsylvania purchaser of goods, such as each member of the Coulter class, also has a private right of action under the Pennsylvania CPL.

15. The Coulter Class and sub-class, by virtue of their

claims for relief pursuant to the Pennsylvania CPL and Bad Faith Insurance statute, have claims atypical of those of the Horton class as well as the class of any other state.

16. The Coulter Class became aware of the pending Horton class action and settlement agreement, and the Horton Class' attempt to encompass the Coulter Class when several Coulter Class members received opt-out notices on or about May 5, 1994.

17. The settlement reached between the Horton Class and MetLife is the product of the claims and defenses available under Florida law and does not adequately protect or serve the rights, interests and/or defenses of contracting parties in Pennsylvania, specifically, the Coulter Class.

18. For example, the Pennsylvania Insurance Department has already ordered the relief which was ordered in the Horton Class settlement, i.e., restitution of premiums paid as a result of MetLife's fraudulent business practices. See Order of Deputy Insurance Commissioner for Pennsylvania Insurance Department,, 2/11/94, (exhibit 3). Enforcing the settlement

agreement with regard to the Coulter Class is a clear abridgement of the class, rights to seek additional damages which are available under Pennsylvania law.

19. Accordingly, the proposed Horton Class Settlement agreement does not adequately protect the Coulter Class' rights and is therefore not in the best interests of the Coulter Class.

20. The Coulter Class has a right to intervene pursuant to Fed.R.Civ.P. 24 (a) (2), on the grounds that the Horton Class settlement may impair the Coulter Class from obtaining the relief to which it is entitled under Pennsylvania statutory and common law. The Coulter Class requests permissive intervention, pursuant to Fed.R.Civ.P. 24 (b) (2), because the Coulter Class' claims share a common question of law or fact with those advanced by the Horton Class; specifically, the fraudulent sales practices of MetLife.

21. The Horton Class action is founded upon Federal and Florida state RICO, breach of fiduciary duty and common law fraud Claims.

22. The allegations contained in the Horton Complaint and

Amended Complaint are dissimilar from the Coulter Class' claims against MetLife. The Horton Complaints purport to contain allegations common to all class members. However, they do not represent and/or contradict the Coulter Class, claims because:

1. the Horton class claims that the MetLife agents in Florida identified themselves to class members "nurse's representatives", Horton Complaint para. 4 (a); whereas Representative Coulter is a steel worker, and never, in the process of purchasing MetLife insurance, did he speak with anyone claiming to be a "steel workers representative"; in addition, the Coulter Class is not limited to any one profession or group;

2. that MetLife agents never referred to life insurance as such, but called it an "investment", Id. at para. 4(d); and that MetLife agents never disclosed that the product being purchased was life insurance, Id. at para. 8; in contrast, MetLife Account Representatives in Pennsylvania stated that the "50/50 plan" had a life insurance "component";

3. that MetLife agents perpetrated interstate wire and mail

fraud on the class; Id. at para. 23 (a) and (b); and that Florida RICO applies to the claims of the class, Id. at pares. 28-35; where the Coulter Class, claims are limited to events which occurred in Pennsylvania;

4. that a Florida agent's (Urso's) actions are common to all class members, Id. at para. 40; where the Coulter Class' claims are based on the representations and/or omissions made only by Pennsylvania Account Representatives and officers;

5. erroneously alleges federal RICO in connection with the class, insurance claims, contradictory to the McCarran-Ferguson Act which dictates that states should regulate their respective insurance industries and that federal causes of action are not applicable, Id. at paras. 20-27; but the Coulter Class has not alleged MetLife RICO violations in connection with its claims.

23. The requirement of Fed.R.Civ.P. 23 (a) (2) that there be "questions of law or fact common to the class" is not satisfied by the Horton Class representative.

24. The requirement of Fed.R.Civ.P. 23 (a) (3) that "the claims or defenses of the representative parties are typical of the

claims or defenses of the class" is not satisfied by the Horton Class representative.

25. The requirement of Fed.R.Civ.P. 23 (a) (4) that "the representative parties will fairly and adequately protect the interests of the class" is not satisfied by the Horton Class representative because the remedies available under Pennsylvania statutes and common law are not available to the Horton Class representative.

WHEREFORE, the plaintiffs respectfully request that all Pennsylvania residents be severed and allowed to proceed, with the Coulters as Class representatives, in Pennsylvania, as a separate class action against the Metropolitan Life Insurance Company. If the Court does not permit severance, in the alternative the aforesaid Pennsylvania residents encompassed by the Horton Class action request that they be permitted to retain Pennsylvania counsel to protect their rights under Pennsylvania law.

Respectfully submitted,

/S/
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CERTIFICATE OF SERVICE

I, Kenneth R. Behrend, hereby certify that a true and correct copy of the within Brief in Support of Plaintiffs, Motion for intervention was served this 20th day of May, 1994, upon the following by United States mail, first class postage prepaid addressed as follows:

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EXHIBIT 1

Excessive FIP ratios were noted for MetLife offices not identified by audit reports.

FINDINGS AND CONCLUSIONS

From analysis of MetLife consumer complaints, audit reports and FIP reports, it was clear management failed to utilize or integrate available internal control mechanisms to detect and control improper replacement activity.

-The impact of improper replacement activity upon complaint data, i.e. increased complaints, would not be expected to occur until such time as new policies failed to perform as solicited. Thus current complaints would not be expected to accurately mirror improper replacement activity as indicated by FIP ratios contemporary to complaints.

-MetLife complaint ratios, due to Replacement and Misrepresentation, of 75.98%, 81.03% and 72.80% in years 1990, 1991 and 1992 (see page 13) should have been cause for MetLife management to have examined those issues and to have scrutinized current audit and FIP reports.

-Access of MetLife corporate management to those reporting

vehicles indicates corporate managements awareness of replacement and misrepresentation as practices existing within the marketing strategy.

-other than audit reports, no MetLife corporate directives specifically identified replacement and misrepresentation issues requiring correction, within Pennsylvania.

-A December 16, 1992 letter by Richard N. Maurer, senior Vice President, Career Agency Operations of MetLife, directed to the MetLife field force, entitled "Honesty and Integrity: our Basis For Doing Business", reiterated MetLife's position requiring honest and ethical business conduct, indicating an awareness and concern of corporate MetLife as to practices of the field force.

-Sales representatives informed customers that existing policies were to be left in place until policy anniversary, and not immediately surrendered, in order to earn dividends.

-Insureds were instructed to disregard MetLife annual premium or lapse notices, which were explained by MetLife sales representatives as computer errors.

-MetLife checks for values taken from existing policies were routed through consumer homes in attempts to conceal replacement activity in conjunction with the sale of a new policy.

-Policies were not countersigned or dated at delivery in three (3) of the six (6) cited cases. Where delivered policies had been countersigned and dated at delivery, two (2) of the three (3) cases showed untimely delivery.

-FINDINGS AND CONCLUSIONS-

The observed pattern of deceptive solicitations and concealed replacements by MetLife sales representatives appears to have been for the purpose of increasing their commissions. Replacement solicitations were such as to cause policyholders, directly or indirectly, to believe that by using their existing policy values to purchase new insurance they were to receive paid-up policies, free coverage, or increased coverage at little or no additional cost.

Supporting the cover letter which accompanied the delivered policy were two (2) pages, one captioned "Individual Retirement

Benefit (I.R.B.) v.s. Individual Retirement Account (I.R.A.) Certificate of Deposit (C.D.)" and the other captioned "Metropolitan Investment Program". The captioned pages represented the Life to 95 policy as an "investment" and a "savings" program. It was falsely stated there was no "penalty for early withdrawal" and that the I.R.B. provided a 119 to 12-t Long Term Rate of Return". MetLife subsequently informed the Insurance Department that based upon the current values, as of December 1992, the policy would require additional premium payments for eight (8) years in order to reach a point where it would become self-supporting.

FINDINGS AND CONCLUSIONS

The Unfair Insurance Practices Act, No. 205, Section 5(a)(1)(vi) defines "Unfair Methods of Competition" and "Unfair or Deceptive Acts or Practices" as 11... Making, publishing, issuing or circulating any estimate, illustration, circular, statement, sales presentation, omission comparison which:" ... Is a misrepresentation for the purpose of inducing or tending to induce the lapse, forfeiture, exchange, conversion or surrender of

any insurance policy".

Section 637 of The Insurance Department Act prohibits misrepresentation of terms of policy and future dividends by agents, brokers, or solicitors. "No agent or solicitor of any insurance company, association, or exchange, and no insurance broker, shall issue, circulate, or use, or cause or permit to be issued, circulated or used, any written or oral statement or circular misrepresenting the terms of any policy issued or to be issued by such company, association, or exchange, or make an estimate, with intent to deceive, of the future dividends payable under such policy.,,

The referenced examples clearly demonstrate the noted pattern of sales practices and procedures used by MetLife sales representatives in utilizing sales illustrations based upon non-guaranteed projected values, and in many cases reinforcing the sales illustration values with cover letters containing misleading statements concerning the insurance policy being sold.

approval, and that only the Tax Advantaged Bonus Plan for Nurses had penetrated into the Pennsylvania marketplace.

MetLife had allegedly recalled and destroyed all unapproved issues of the advertising. The MetLife corporate advertising was found consistent with other questioned advertising, in that it promoted the sale of whole life policies of insurance through solicitations promising earnings for retirement. While containing footnoted disclosure information, the various advertising pieces possessed a capacity, through stating precise earning values, to deceive consumers as to future earnings. Further, sales solicitation scripts employed by telemarketers clearly avoided the presentation of the Tax Advantaged Bonus Plan as insurance. The Tax Advantaged Bonus Plan was found to have evolved from 1991 to 1993 through the backing of MetLife Senior Vice President Richard N. Maurer and was, in fact, termed alternatively "The Maurer Plan". Charles M. Kavitsky, Territorial officer In Charge and Vice President, Mideastern Territory, was found to have coordinated and provided telemarketing support to MetLife sales representatives J. Joel Sherman, Richard Antonino, and Ronald Schram in Western Pennsylvania for the Tax Advantaged Bonus Plan.

-FINDINGS AND CONCLUSIONS-

Although the examination could not identify in detail the full extent of market penetration gained by MetLife through use of the various retirement/savings/investment plan solicitations, testimony of consumers and MetLife agents contacted during the examination indicated the misleading solicitation methods were used routinely to solicit Whole Life, Life to 95, and Life to 98 policies sold by MetLife. It is clear the various forms of advertising developed and used by MetLife sales representatives were designed to preclude proper disclosure of insurance sales to Pennsylvania consumers. It was also noted, while the focus of the examination was an a six (6) county Western Pennsylvania Region, the various marketing schemes and practices occurred throughout Pennsylvania.

X. FORMS FILING AND APPROVAL

Throughout the course of the examination, it was noted MetLife policies viewed in consumer homes, policy copies sent into the Department in response to mail surveys, and specimen policies provided by MetLife's Johnstown office differed from

the corresponding MetLife policy forms which were approved by, and on file with, the Department.

Whole Life Policy (7-87) and Life to 95 (57-87): Form approval was granted by the Department for both policy forms on June 2, 1987. Departmental approval was granted to MetLife for replacement of policy pages seven (7) and eight (8) for both forms on June 12, 1991. The approved replacement pages provided consumers notice that; "You may ask us to pay premiums with a combination of yearly dividends, the cash value to any paid-up additions and/or any dividend accumulations. As long as these values are great enough, out-of-pocket premiums need not be paid to keep your policy in force." All policy forms 57-87 and 7-87 encountered during the examination, issued subsequent to June 12, 1991, contained the earlier pages which had been replaced with the pages approved June 12, 1991.

Upon subsequent review by MetLife, it was reported to the Department a total of seventy thousand five hundred fifty-seven (70,557) incorrect Whole Life Policy (7-87) forms and ten thousand three hundred eighty-one (10,381 Life to 95

(57-87) policy forms had been issued to Pennsylvania consumers. As a result, these two (2) unapproved policy versions were issued to a total of eighty thousand nine hundred thirty-eight (80,938) consumers subsequent to June 12, 1991.

Survivorship Whole Life Policy (2J-90 PA):

Form approval was granted by the Department for this policy form on October 23, 1990. MetLife had initially submitted a generic policy form 2J-90 which was disapproved by the Department. Resubmission was made in the form of 2J-90 PA, which included revisions to pages one (1) and nine (9), from what was originally filed under form 2J-90, concerning Supplemental Insurance Benefit and Split Policy Option. Based upon the revisions, policy form 2J-90 PA was then approved. However, all Survivorship Whole Life policies (2J-90 PA) noted during the examination contained the original page one (1) contained in policy 2J-90 which was not approved for use in Pennsylvania.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighty-three (383)

unapproved versions of Survivorship Whole Life policy 2J-90 PA, containing the unapproved language on page one (1), had been issued to Pennsylvania consumers subsequent to October 23, 1990.

Flexible Premium Life Insurance Policy (7UL-90): Form approval was granted by the Department for this policy form on August 23, 1990. The initial MetLife submission was disapproved. Among the points of disapproval was the use of disclosure language on the Policy Specification page stating "The Planned Premium shown below may need to be increased to keep this policy and coverage in force." The Department required additional disclosure language "Even if coverage continues, the amount payable on the final date of policy nay have little or no value.", be added to the disclosure language submitted on the Specification Page in order to be considered for approval. MetLife subsequently submitted an amended Policy Specification page with the requested disclosure language, and Departmental approval was granted August 23, 1990.

All Flexible Premium Life Policies (7UL-90) noted during the

examination contained the limited, unapproved, disclosure language on the Policy Specification page and lacked the disclosure language required to obtain approval of the policy. This is of serious concern to the Department since it was noted throughout the examination the Flexible Premium Life Policy (9UL-90) was the primary policy sold using the "free insurance" and "paid-up insurance" solicitations. The absence of the required disclosure notice to policyholders, denied consumers full and fair disclosure concerning future premium payments and policy value. The lack of proper disclosure was found to be particularly serious in terms of damage to consumers in view of the manner in which the policies were solicited and sold.

Upon subsequent review by MetLife, it was reported to the Department a total of twenty nine thousand eight hundred forty-two (29,842) Flexible Premium Life Policies (7UL-90) were issued to Pennsylvania consumers with unapproved and incomplete disclosure language.

Multifunded Flexible Premium Life Policy (7.6FM-90): Both unisex and sex distinct versions of this policy were granted

Departmental approval on November 6, 1990. It was noted throughout the examination policy form 7.6FM-90, as actually issued to consumers, contained additional unapproved policy language on pages 1, 3, 3.1, and 5.

Upon subsequent review by MetLife, it was reported to the Department a total of six thousand five hundred forty-two (6,542) unapproved versions of the Multifunded Flexible Premium Life Policy (76.FM-90) were issued to Pennsylvania consumers subsequent to November 6, 1990.

Throughout the course of the examination, all policy forms noted in consumer homes, as well as duplicate policies provided by MetLife, at the Department's request, contained non-guaranteed illustrated value tables bound in with the policy pages. Since only guaranteed value tables are permitted to be included in a bound policy, each policy containing the non-guaranteed illustrated value tables constitutes an unapproved version of the policy.

Upon subsequent review by MetLife, it was reported to the Department a total of three hundred eighteen thousand eight

hundred forty-two (318,842) policies were issued to Pennsylvania consumers containing unapproved non-guaranteed illustrated value tables. According to MetLife, this occurred with all life and annuity policies issued from the Johnstown, Pennsylvania office since 1988.

- FINDINGS AND CONCLUSIONS -

In summation of the above findings, a total of four hundred thirty-six thousand five hundred forty-seven (436,547) unapproved policy forms were issued to Pennsylvania consumers. Section 354 of the Insurance Company Law (40 P.S.477b) specifically states it shall be unlawful for any insurance company doing business in the Commonwealth of Pennsylvania to issue, sell, or dispose of any policy or contract covering life insurance or annuities until the forms have been submitted to and formally approved by the Insurance Commissioner.

It should be noted that during the course of the examination MetLife cooperated fully in providing the Insurance

Department with all requested documents, and beginning inquiries into the various consumer complaints which surfaced during the examination in order to determine necessary corrective action required to make damaged consumers whole.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON,
JOYCE ARMBRUSTER, and
DEBORAH K. SPAMER,

Plaintiffs,

VS. Case No. 93-1849-Civ-T-23A

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant.

ORDER WITH RESPECT TO CLASS CERTIFICATION, NOTICE, AND SETTLEMENT HEARING

Before the Court is the parties' "Joint Motion for an order Certifying Proposed Settlement Class, Preliminarily Approving Proposed Settlement, Approving Notice and Setting Fairness Hearing" (Doc. 35), filed on April 12, 1994. On April 19, 1994, the Court conducted a hearing on the motion. The plaintiffs, on behalf of themselves and a putative class, and Metropolitan Life Insurance Company ("MetLife") have agreed to a settlement and compromise of this action upon the terms set forth in the

Settlement Agreement attached as Exhibit 1 to the motion. Upon consideration of the motion, the settlement agreement, the supporting memoranda, other relevant documents, and the presentation of the parties at the hearing, the motion (Doc. 35) is GRANTED. Accordingly,

IT IS HEREBY ORDERED that:

1. A settlement class consisting of

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993,

is hereby certified under Rule 23(b)(3), Fed. R. Civ. P., solely for the purpose of settlement.

2. W. Christian Hoyer and Judy S. Hoyer of James, Hoyer, Newcomer & Skye, P.A., and Ron Parry of Arnzen, Parry & Wentz, P.S.C., are designated as settlement class counsel.

3. The settlement evidenced by the Settlement

Agreement is sufficiently reasonable, adequate, and fair to warrant notice to the members of the settlement class and a full hearing on the settlement, and the Court hereby preliminarily approves the settlement.

4. A hearing shall be held before this Court at 10:00 a.m. on Monday, July 18, 1994, in Courtroom E, United States Courthouse, 611 North Florida Avenue, Tampa, Florida 33602-4520, to consider the fairness, reasonableness, and adequacy of the Settlement Agreement and whether it should be approved by the Court.

5. Individual Notice and a Proof of Claim in substantially the form annexed as Exhibits A and B to the Settlement Agreement shall be mailed on or before May 2, 1994 to those persons identified in Paragraph 9 of the Settlement Agreement. A publication notice substantially in the form annexed to the Settlement Agreement as Exhibit C shall be published in USA Today, New York Daily News, Los Angeles Times, Chicago Sun-Times, Philadelphia Inquirer, Pittsburgh Post Gazette, Birmingham News, Atlanta Constitution, Tampa Tribune, Miami

Herald, American Journal of Nursing, and RN Magazine, on or before May 9, 1994 (or as soon thereafter as the periodicals publication schedule permits), and again on or before May 14, 1994 (or as soon thereafter as the periodicals publication schedule permits) except American Journal of Nursing and RN Magazine as to which no second publication is required.

6. Notice given in the form and manner provided in Paragraph 5 of this order is hereby found to constitute the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement, and settlement hearing to all class members who can be identified through reasonable effort, and to constitute due and sufficient notice for all other purposes to all persons entitled to receive notice required by due process and Rule 23 of the Federal Rules of Civil Procedure.

7. MetLife and settlement class counsel shall file proof of the mailing and publication of notice at or before the settlement hearing.

8. In order to be entitled to participate in the settlement, if it is approved, a member of the class must file a

Proof of Claim in the manner set forth in the Settlement Agreement so that it is postmarked no later than June 30, 1994. Any member of the class who does not file a timely and valid Proof of Claim and does not timely request to be excluded from the class shall not be entitled to share in the proceeds of this settlement but nonetheless shall be bound by the judgment and release in this action as set forth in the Settlement Agreement.

9. All members of the class who wish to exclude themselves from the class shall do so by mailing, by first class mail, a timely and valid request for exclusion to the Claims Administrator, at the address set forth in the Notice, postmarked on or before June 13, 1994. If the settlement is approved, any and all class members who do not exercise their right to be excluded from the class shall be bound by all proceedings, orders, and judgments in this action.

10. Any member of the class who did not elect to exclude himself or herself from the class may appear at the hearing, in person or by counsel, and be heard in support of or in opposition to the settlement, or any part of it. Any member of the

class who wishes to appear for the purpose of objecting to the settlement shall file on or before June 13, 1994, a notice of intention to appear and a written statement of the basis for the objection, along with all other papers or briefs he or she wishes the Court to consider. These papers shall be filed with the Clerk of the Court, United States District Court, Middle District of Florida, Tampa Division, with copies of all filed papers served, in person or by mail, on Debevoise & Plimpton, 875 Third Avenue, New York, New York 10022, att. Lorna G. Schofield, Esq., and Arnzen, Parry & Wentz, P.S.C., 600 Greenup Street, P.O. Box 472, Covington, Kentucky 41012, att: Ron Parry, Esq. Any member of the class who does not timely file and serve a written objection shall not be permitted to raise the objection, except for good cause shown, and any member of the class who fails to object in the manner prescribed herein shall be deemed to have waived, and shall be foreclosed from raising, any objection.

11. Each class member who wishes to appear through separate counsel and/or to address the fairness, reasonableness, or adequacy of this Settlement Agreement shall serve on settlement

class counsel and counsel for MetLife and file with the Court on or before June 13, 1994, a notice of intention to appear and/or object, together with copies of any papers the settlement class member intends to present to the Court in connection with the Settlement Agreement, or be forever barred from separately appearing and/or objecting.

12. MetLife and settlement class counsel shall serve on each other and on all other parties who have filed a notice of appearance and file with the Court on or before June 28, 1994, any further documents in support of the settlement agreement, including responses to any papers filed by settlement class members.

13. MetLife and settlement class counsel, or their designated agent shall rent a post-office box in the name of the Clerk of the Court, to be used for receiving requests for exclusion and the Proofs of Claim and for other communications, and only MetLife, settlement class counsel and their designated agents shall have access to this post-office box.

14. MetLife and settlement class counsel shall establish, with court approval, a means to administer the settlement

and process Proofs of Claim.

15. Settlement class counsel shall promptly furnish counsel for MetLife with copies of any and all Proofs of Claim or written requests for exclusion that may come into settlement class counsels possession.

16. In the event the settlement is not approved by the Court or the approval does not become final pursuant to the terms of the settlement, or for any reason the settlement is terminated or does not become effective, then the settlement shall become null and void and of no further force and effect, and shall not be used or referred to for any purpose whatsoever. In such event, the class certification, settlement, and all negotiations and proceedings relating thereto shall be withdrawn without prejudice as to the rights of any and all parties thereto who shall be restored to their respective positions prior to the execution of the settlement.

17. The Court hereby reserves the right to adjourn the hearing without further written notice.

ORDERED in Tampa, Florida, on April 22nd, 1994.

Steven D. Merryday
United States District Judge

Metropolitan Life Insurance Litigation
Claims Administrator
P.O. Box 9372
Garden City, N.Y. 11530-9372
1-800-566-6365

MET Must be Postmarked
No Later Than
June 30, 1994

MET

PROOF OF CLAIM FORM

IMPORTANT: DO NOT complete this form if you wish to keep your MetLife whole life insurance policy, or if you have mailed a letter requesting to be excluded from the class in this case.

Please show any corrections here.

Name and Address

Daytime phone

Policy Number

Tax ID Number

(Social Security Number

or Employer 10 Number) This is a:

Social Security Number OR Employer ID Number

I am the sole owner of the policy identified above, OR

I own the policy jointly with other(s) (Please list below).

I hereby certify that each of the following statements is true:

I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

At or prior to the time that I made the purchase, I received from a MetLife representative a written or other sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time that I bought it.

Please attach a copy of any such literature if you still have it, If you have done so, check here.

If you wish to add a statement that further describes the misleading sales solicitations by MetLife representative(s), you may do so here or you may add additional pages.

Please check ONE of the following:

A. If you have a policy and your premiums are paid to date:

I request a CASH refund. *OR* I request an ANNUITY (I understand that I will be sent a description of the annuity and forms to complete.)

I understand that if I request a cash refund or an annuity, the whole life policy identified in this Proof of Claim Form will be cancelled and there will be no further benefits or protection under that policy as of June 30, 1994.

OR

B. If your policy has lapsed or been surrendered, then your only option is to receive a cash refund. To request one please check:

Please check ONE of the following boxes: I request a CASH refund.

I have ENCLOSED my original policy. I cannot enclose my original policy because (explain why).

RELEASE

I hereby expressly agree that I will not now or hereafter institute, maintain or assert against Metropolitan Life Insurance Company or its predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents or representatives of any or all of them, either directly or indirectly ("MetLife"), on their own behalf or on behalf of any other person, and do hereby release MetLife from any and all causes of action, claims, damages, equitable and legal relief, demands or rights that have been or could have been asserted by me, my predecessors, successors, affiliates, heirs, administrators, executors, successors in interest, agents and assigns, in the *Sherry Horton v. Metropolitan Life Insurance* Co. action or that have been, could have been, may be or could be alleged or asserted against MetLife now or hereafter, on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, asserted, described, set forth or referred to in the above action or related to the sales solicitation or purchase of the whole life policy described

above.

I understand that this claim is being filed as part of a Court action, and I recognize that filing a false Proof of Claim Form in Court could subject me to penalties that might be imposed on me by the Court.

I certify that I am not subject to backup withholding. (If you have been notified by the IRS that you are subject to backup withholding, strike out the previous sentence.)

IMPORTANT: If policy is owned by two or more joint owners, all joint owners must sign.

Date:

_____ _____ _____

SIGNATURE of Owner Type or print name

SWORN TO or affirmed before me

this __ day of _____, 1994 _____ Notary Public

_____ _____ _____

SIGNATURE of Joint Owner (if any) Type or print name

SWORN TO or affirmed before me

this __ day of _____, 1994 _____ Notary Public

If the Claimant is other than an individual, or if the Claimant is not the person completing this form, the following must also be provided:

No. 96-1975

(3)

Supreme Court, U.S.
FILED
JUL 14 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RONALD COULTER, ET AL.,

Petitioners,

—v.—

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO THE PETITION

PATRICE SMILEY ANDREWS
Metropolitan Life Insurance Company
One Madison Avenue
New York, New York 10010
(212) 578-4935

LORNA G. SCHOFIELD*
Debevoise & Plimpton
875 Third Avenue
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Attorneys for Respondent
Metropolitan Life Insurance Company

July 14, 1997

**Counsel of Record*

85 pp

QUESTIONS PRESENTED

In the wake of a federal class action settlement in another court, the District Court below exercised its discretion under 28 U.S.C. § 1404(a) to transfer four civil actions involving apparent settlement class members to the federal court that previously had approved the settlement, had retained jurisdiction to enforce its final judgment, and had enjoined related litigation in other forums. The Court of Appeals denied without comment the petitions for extraordinary writs of mandamus to vacate the interlocutory, discretionary transfer orders. The certiorari petition in this Court raises two questions:

1. Did the Court of Appeals abuse its discretion in declining to issue extraordinary writs of mandamus to vacate the District Court's exercise of its discretion to transfer these actions to the forum of a related class action despite petitioners' assertion of a due-process right to "collaterally attack" the class action judgment in the forum of their choice, where the transfers will not prevent petitioners from "collaterally attacking" that judgment?

2. Did the Court of Appeals abuse its discretion in declining to issue the extraordinary writs of mandamus despite petitioners' contention that the McCarran-Ferguson Act requires application of Pennsylvania law to their claims, even though the District Court's transfer orders have no effect on applicable choice-of-law rules and the transferee court can apply Pennsylvania law to the extent appropriate?

LIST OF PARTIES BELOW AND LIST OF PARENT COMPANIES AND SUBSIDIARIES

Other than the parties listed in the petition, the parties in the lower courts include plaintiffs Christopher Clancy and Beth Raible and defendants James D. Spangler, Jeffrey J. Rodgers and Robert Martini.

Respondent Metropolitan Life Insurance Company ("MetLife") has no parent company. MetLife directly or indirectly owns for its own account at least 10% but less than 100% of the outstanding voting stock of the following publicly-traded companies:

Chart House Enterprises, Inc.
Lone Star Industries, Inc.
New England Investment Companies, L.P.

MetLife also directly or indirectly owns for its own account at least 10% but less than 100% of the outstanding voting stock of the following companies:

AEW Advisors, Inc.
AEW Capital Management, Inc.
AEW Capital Management, L.P.
AEW Hotel Investment Corporation
AEW Hotel Investment Limited Partnership
AEW Investment Group, Inc.
AEW Real Estate Advisors, Inc.
AEW Real Estate Advisors, Limited Partnership
AEW Securities, L.P.
Aldrich Eastman Global Investment Strategies, LLC
Back Bay Advisors, Inc.
Back Bay Advisors, L.P.
BBC Investment Advisors, Inc.
BBC Investment Advisors, L.P.
Blodgett Holdings, Inc.
Briggs Holdings, Inc.
Briggs Plumbing Products, Inc.
Capital Growth Management Limited Partnership

Chart House Enterprises, Inc.
Cloverleaf Properties, Inc.
Coating Technologies International, Inc.
Copley Management Advisors, L.P.
Copley Properties Company, Inc.
Copley Properties Company II, Inc.
Copley Properties Company III, Inc.
Copley Public Partners Holding, L.P.
Copley Securities Corporation
Copley/Orchard Investors, Inc.
Copley/Orchard Investors, L.P.
CREA Investors/Santa Fe Springs, Inc.
CREA Western Investors I, Inc.
CREA Western Investors, L.P.
CTR Corp.
Dan River, Inc.
Eclipse Claim Services Inc.
Eighth Copley Corp.
Fifth Copley Corp.
Fifth Singleton Corp.
First Income Corp.
Fourth Copley Corp.
Fourth Income Corp.
Fourth Singleton Corp.
Frialator International, Limited
Genesis Seguros Generales, Sociedad Anonima de Seguros y Reaseguros
Graystone Partners, Inc.
Graystone Partners, L.P.
GS Blodgett Corporation
GS Blodgett International Ltd.
HACO Corp.
Harris Associates, Inc.
Harris Associates Securities, L.P.
Interbroker, Correduria de Reaseguros, S.A.
Kolon-Met Life Insurance Company
Lone Star Industries, Inc.

Loomis, Sayles & Company, Inc.
Loomis, Sayles & Company, L.P.
Luther's Bar-B-Q', Inc.
Magikitch'n, Inc.
MC Management, Inc.
MC Management, L.P.
Mecca Software, L.L.P.
Mercadian Capital L.P.
Mercadian Funding L.P.
Met Life International Real Estate Equity Shares, Inc.
Metric Apartment Co-Investment Trust, Inc.
Metric Colorado, Inc.
Metric Institutional Apartment Fund II, L.P.
Metropolitan Structures
Morguard Investments Limited
Nailite International Inc.
NEF Corporation
NEIC Holdings, Inc.
New England Funds, L.P.
New England Funds Management, L.P.
New England Investment Associates, Inc.
New England Investment Companies, L.P.
Origenes AFJP S.A.
Pesco Plus, L.C.
Pitco Frialator, Inc.
Public Employees Equities Services Company
R&T Asset Management, Inc.
Reich & Tang Asset Management, Inc.
Reich & Tang Asset Management, L.P.
Reich & Tang Distributors, L.P.
Reich & Tang Services, L.P.
Santander Met, S.A.
Second Income Corp.
Seventh Copley Corp.
Sixth Copley Corp.
Sixth Singleton Corp.
Seguros Genesis, S.A. (Mexico)

Seguros Genesis, S.A. (Spain)
Third Income Corporation
Third Singleton Corporation
Vaughan, Nelson, Scarborough & McConnell, L.P.
VNSM, Inc.
Westpeak Investment Advisors, Inc.
Westpeak Investment Advisors, L.P.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1975

RONALD COULTER, ET AL.,

Petitioners,

– v. –

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT METROPOLITAN LIFE INSURANCE COMPANY IN OPPOSITION TO THE PETITION

Respondent Metropolitan Life Insurance Company ("MetLife") respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATUTES AND OTHER PROVISIONS INVOLVED

The petition involves 28 U.S.C. § 1404(a). Petitioners also purport to raise arguments under the Due Process Clause of the Fifth Amendment to the United States Constitution and under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. The text of the relevant provisions is reprinted in the appendix to this brief. [Appendix ("App.") 1a.]

STATEMENT OF THE CASE

This petition—which marks various petitioners' and their counsel's second attempt to obtain a writ of certiorari on the same

issues—arises from several discretionary orders by the United States District Court for the Western District of Pennsylvania transferring petitioners' four actions to the Middle District of Florida under 28 U.S.C. § 1404(a). The District Court in Florida previously had entered judgment in a nationwide class action settlement and had retained jurisdiction to enforce its judgment.

MetLife asked the Pennsylvania court to transfer petitioners' cases to Florida because petitioners are (or seek to represent) members of the settlement class and because the class action judgment precludes many of the claims petitioners continue to assert. In addition, petitioners' counsel and several of the petitioners actually had appeared and had litigated—and lost—their claims in the Florida federal court and on appeal. Not surprisingly, the certiorari petition nowhere cites the Eleventh Circuit decision rejecting all of petitioners' counsel's arguments as "frivolous" and imposing sanctions under Fed. R. App. P. 38. *See Grilli v. Metropolitan Life Ins. Co.*, 78 F.3d 1533, 1539 (11th Cir.), *clarified*, 92 F.3d 1074 (11th Cir.), *cert. denied sub nom. Coulter v. Metropolitan Life Ins. Co.*, 117 S. Ct. 608 (1996), *reh'g denied*, 117 S. Ct. 1121 (1997).

The District Court in Pennsylvania did not rule on the substance of petitioners' claims or MetLife's defenses. The court simply exercised its discretion to transfer the cases to the forum of the related class action in the interests of justice and convenience. Petitioners unsuccessfully sought mandamus from the Third Circuit and—despite their failure to meet any of the criteria of Sup. Ct. R. 10—have again petitioned this Court for certiorari.

A. Background of the Florida Class Action

On November 1, 1993, *Horton v. Metropolitan Life Insurance Company*, No. 93-1849-CIV-T-23A, was filed in the United States District Court for the Middle District of Florida. The plaintiffs asserted federal and state-law claims on behalf of a putative nationwide class of persons who had purchased MetLife whole life insurance policies as "retirement plans" or "savings plans" based on sales solicitations that allegedly had not fully disclosed that the products being sold were life insurance policies.

1. The *Horton* Settlement Agreement

After several months of arm's-length and at times acrimonious negotiations, MetLife and the *Horton* plaintiffs reached a proposed settlement. On April 22, 1994, the *Horton* court preliminarily approved the proposal and conditionally certified a nationwide opt-out settlement class under Fed. R. Civ. P. 23(b)(3), consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other office of MetLife between January 1, 1990 and October 31, 1993. [Appendix to Petition for Certiorari ("Pet. App.") 249a, ¶ 1.]

The proposed settlement offered eligible class members full restitution of all net premiums they had paid to MetLife, plus interest (or, for persons with in-force policies, the option of an annuity funded in the amount of the cash refund). [App. 7a, ¶ 5.] In addition, MetLife agreed to pay the plaintiffs' attorneys' fees without diminishing the class members' recovery. The settlement resolves only those claims arising from past insurance sales. It does not purport to resolve claims arising from future conduct or to regulate MetLife's future conduct in any way.

Pursuant to the Settlement Agreement and the *Horton* court's order, notice of the proposed settlement was mailed to some 71,000 potential settlement class members and was published in various national and regional newspapers and magazines. [App. 11a, ¶¶ 15-16.] The court's order required all potential class members who did not wish to participate in the settlement class to submit written requests for exclusion by June 13, 1994. [Pet. App. 252a, ¶ 9.] The court also set a date for a hearing on class certification and final

approval of the settlement, at which class members could appear and object.

2. The Coulters' Participation in the Settlement Hearing

Ronald and Anissa Coulter, who are among the petitioners, appeared in the *Horton* action through their present attorneys (the "Behrend firm"). They did not file a timely request to opt out of the settlement class, but instead chose to object to the settlement and appear at the settlement hearing. *See Grilli*, 78 F.3d at 1536-37.

The Coulters also filed an "intervention" motion asking the *Horton* court (*i*) to "sever" all Pennsylvania residents from the *Horton* settlement class so the Coulters could seek to represent them in a separate putative class action, or, alternatively, (*ii*) to allow the Coulters to "retain" their own counsel on behalf of the Pennsylvania members of the *Horton* class. [Pet. App. 230a.] Although they have never been certified as representatives of any class, the Coulters and their counsel purported to speak on behalf of all Pennsylvania members of the *Horton* settlement class, whom the Coulters sought to represent as a putative "class" and "subclass" in the *Coulter* action in Pennsylvania. *See infra* pp. 7-8.

On July 18, 1994, the *Horton* court held a full-day evidentiary hearing on the proposed settlement, the Coulters' "intervention" motion, and various other matters. The Coulters, through the Behrend firm, appeared and objected to the proposed settlement. They also argued at length in support of their "intervention" motion. *See Grilli*, 78 F.3d at 1536.

3. The Final Judgment and Injunction in *Horton*

On October 25, 1994, the *Horton* court entered an order [App. 23a] and final judgment [*id.* 27a], supported by extensive findings of fact and conclusions of law [*id.* 6a], approving the class action settlement and dismissing all settlement class members' claims "on the merits and with prejudice" [*id.* 25a, ¶ 6; *id.* 28a, ¶ 2]. The court rejected all of the objections raised by the Coulters and the Behrend firm [*id.* 17a, ¶ 39], including their argument that alleged differences between the laws of Pennsylvania and other states made

class certification inappropriate [Pet. App. 132a-133a, ¶ 53]. The *Horton* court also concluded that the settlement class met the requirements of Fed. R. Civ. P. 23. [App. 15a-16a, ¶ 34; Pet. App. 128a-129a, ¶ 47.]

The court therefore ruled that "[t]he Settlement Agreement is and shall be binding on all settlement class members" [App. 24a, ¶ 4], and it released MetLife and its employees from, among other things, class members' claims related to the sale of whole life insurance policies as retirement or savings plans [*id.* 24a-25a, ¶ 5]. The court expressly retained continuing jurisdiction to enforce its orders and administer the settlement. [*Id.* 25a-26a, ¶ 7; *id.* 28a ¶ 3.] On November 8, 1995, pursuant to its retained jurisdiction, the court permanently enjoined all *Horton* class members and their attorneys and representatives (among others) from litigating *Horton*-related claims in any other forum. [Pet. App. 117a, ¶ 6.]

4. Denial of the Behrend Firm's *Horton* Motions

The *Horton* court not only rejected the Coulters' and the Behrend firm's objections to the proposed settlement; it also denied numerous motions filed by counsel and their various clients.

First, at the settlement hearing, the court orally denied the Coulters' "intervention" motion. The court later issued a written order, accompanied by detailed findings of fact and conclusions of law, on October 25, 1994. [Pet. App. 119a-134a.]

The court expressly found that "the Coulters are settlement class members." [Pet. App. 126a, ¶ 43.] They therefore had a "legally protectable interest in the subject of [the *Horton*] action." [*Id.*; *see also* Pet. App. 127a, ¶ 45 ("[a]s settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel").] But the court denied intervention because it found that the Coulters were adequately represented by class counsel and did not satisfy other prerequisites of Fed. R. Civ. P. 24. [*Id.* 126a-128a, ¶¶ 43-44, 46 ("reject[ing] the Coulters' argument that [the *Horton*] plaintiffs cannot or will not adequately represent their interests").]

After the oral denial of their "intervention" motion, the Coulters and various other Behrend firm clients moved for leave to opt out of the class belatedly. The court denied the motions, concluding that the movants had failed to show "excusable neglect" for their untimeliness, as required by Fed. R. Civ. P. 6(b)(2). Devoting particular attention to the Coulters, the court ruled that,

> [a]s class members, the Coulters [had] filed a notice of intention to appear and objections to the proposed settlement. . . . Apparently, the Coulters made a tactical decision to avoid exclusion for the purpose of objecting to the settlement and seeking significant relief (i.e., exclusion of all Pennsylvania residents or appointment of their attorney as class counsel). However, they cannot have it both ways. *The Coulters had a choice to opt out or participate. They chose to participate.* [App. 36a (emphasis added).]

Various other persons represented by the Behrend firm — including petitioners Shelley Daughenbaugh and Robert Hemcher — filed yet another motion in the *Horton* court, this time seeking a declaration that they were not *Horton* class members. [*See id.* 39a.] Noting the total absence of specific evidentiary support for the motion, the *Horton* court denied it without prejudice, and directed that "any petitioner wishing to obtain a declaration of their status in relation to this class action shall file [with a special master] on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence." [*Id.* 40a.] The movants did not do so.

In addition, the Coulters and the Behrend firm moved for "injunctive relief," "remedial measures" and "sanctions," alleging that two MetLife sales representatives had improperly contacted several *Horton* class members. The motion sought "permission to conduct discovery, to require the issuance of a new class notice, to appoint their attorney, Behrend, as co-counsel for the class, and to award attorney's fees." *Grilli*, 78 F.3d at 1537. The *Horton* court denied this motion for lack of evidentiary support. Concluding that the motion "'appears to have been filed for the sole purpose of

causing delay, derailing the proposed class action settlement, and generating legal fees for the Coulters' attorneys,'" the court *sua sponte* admonished the Coulters and the Behrend firm to "'remain mindful of the provisions of [Federal Rule of Civil Procedure] 11.'" *Id.* at 1537 n. 6 (quoting District Court).

5. The Behrend Firm's *Horton* Appeals

The Behrend firm, on behalf of the Coulters and its other clients (including petitioners Daughenbaugh and Hemcher), filed four appeals from the *Horton* court's rulings. However, neither the Behrend firm nor anyone else attempted to appeal the final judgment approving the class action settlement.

The Eleventh Circuit affirmed the *Horton* court's rulings in all respects, found all four of the Behrend firm's appeals "frivolous," and awarded "double costs and reasonable attorneys' fees" against the appellants. *Grilli*, 78 F.3d at 1535, 1539. The Behrend firm petitioned for rehearing, which was denied. Counsel then moved for leave to file a second petition for rehearing, but the Eleventh Circuit denied leave to file.

The Behrend firm and its clients next petitioned this Court for a writ of certiorari, which was denied. 117 S. Ct. 608 (1996). They then sought rehearing, which also was denied. 117 S. Ct. 1121 (1997).

B. Background of the Behrend Firm's Pennsylvania Actions

The four actions at issue in the present petition were filed by the Behrend firm in Pittsburgh, Pennsylvania. All four cases, like the *Horton* action, allege that MetLife sold life insurance policies as retirement or savings plans without fully disclosing that the products being sold were life insurance policies.

1. *Coulter v. MetLife*

The Behrend firm filed the *Coulter* putative class action on March 25, 1994, almost five months after the *Horton* case had commenced. The Complaint, as amended, purports to assert claims on behalf of 15 named plaintiffs and a putative "class" consisting of "all

of the Pennsylvania residents who purchased from [MetLife], life insurance policies or annuities which said [*sic*] policies or contracts covering life insurance or annuities were not formally approved by the Pennsylvania Insurance Commissioner." [Pet. App. 144a, ¶ 16.] The Complaint also purports to plead claims on behalf of a putative "subclass" consisting of:

> all Pennsylvania residents who purchased from [MetLife] a "50/50 Savings Plan," a "State Street Wealth Accumulation Plan," an "Individual Retirement Benefit Plan," a "Nurse's Insured Retirement Plan," a "Nurse's Guaranteed Retirement Plan," a "Tax Advantaged Bonus Plan," an "Enricher Insured Savings Plan," and/or any retirement and/or savings plan, which each [*sic*] was purported to have life insurance "components," but which in reality were [*sic*] nothing more than life insurance policies. [*Id.* 156a, ¶ 35.]

As to this putative "subclass," the Complaint alleges that MetLife "intentionally sold policies of life insurance as a retirement and/or savings plan for the insured, with a life insurance component, to consumers that were interested in purchasing a savings plan and/or a retirement plan, not life insurance. The customers did not get what they had bargained for." [*Id.* 158a-159a, ¶ 43.] The Complaint pleads that "MetLife was offering one product (the retirement/investment plans set forth in the paragraph above), and selling another (a life insurance policy)." [*Id.* 156a, ¶ 36.]

2. ***Rostek v. MetLife***

The Behrend firm filed the *Rostek* putative class action on June 30, 1994. The Complaint, as apparently modified by a later motion for class certification, purports to assert claims on behalf of eight named plaintiffs and a purported class of:

> All Pennsylvania residents who have purchased "college savings plans," which in reality were only large MetLife life insurance policies on children under eighteen years of age, in an amount in excess of $10,000.00. [*Rostek* Record ("R.") 20, ¶ 1.]

The *Rostek* Complaint charges that MetLife "intentionally sold life insurance policies as a college savings plan to consumers that were interested in purchasing a college savings plan for their child, not life insurance. The customers did not get what they had bargained for." [R.1, ¶ 4.] The complaint further alleges that "MetLife was offering one product (a College Savings Plan for the child and/or children) and selling another (a life insurance policy on the child and/or children)" [*id.* ¶ 3], and that MetLife "defraud[ed] customers by using sales tactics that failed to identify life insurance as the product of sale" [*id.* ¶ 6].[1]

3. ***Corriere v. MetLife***

The Behrend firm filed the *Corriere* case on May 8, 1995, long after the *Horton* court had entered its final judgment on October 25, 1994. The Corrieres, who did not opt out of the *Horton* settlement class, assert claims relating to their purchase of two whole life insurance policies issued during the class period.

The Complaint begins with allegations that MetLife

> developed a marketing technique under which its agents are trained and directed by MetLife to sell life insurance through a series of "scripted" misrepresentations, which led unsuspecting consumers to believe the policies they are purchasing are adequate vehicles to serve as *retirement or investment plans*. [R.6, Ex. E, ¶ 24 (emphasis added).]

The Complaint then alleges the Corrieres were the purported victims of this conduct: it asserts a MetLife sales representative "represented that these policies could provide the Plaintiffs with significant *savings* which could be used in the future for their *retirement*" [*id.* ¶ 31 (emphasis added)]. The Complaint also accuses MetLife of "engag[ing] in a pattern of misrepresenting the *nature*

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1. The named plaintiffs in *Rostek* are not *Horton* class members: one of them timely excluded himself from the settlement class, and the others do not come within the class definition. Many of the putative class members, however, appear to be *Horton* settlement class members, and the *Rostek* named plaintiffs purport to assert claims on their behalf.

[a]nd terms of the products that they were selling to the Plaintiffs, with the intent of inducing the Plaintiffs to purchase *something other than what it was represented to be*" [*id.* ¶ 71 (emphasis added)].

4. *Smith v. MetLife*

The Behrend firm filed the *Smith* action on behalf of Douglas Smith in October 1995, and later commenced a separate action on his behalf against another defendant (a MetLife sales representative) in January 1996. The Behrend firm then moved to consolidate the two cases and explained that

> [b]oth actions arise out of a series of solicitations in which the Defendant agents, Jeffrey J. Rodgers and Robert Martini, together, on behalf of their principal, [MetLife], fraudulently induced the Plaintiff to purchase a life insurance policy through *misrepresentations that this policy was a "retirement plan."* [R.5, Ex. E, ¶ 1 (emphasis added).]

The life insurance policy Smith had purchased was a whole life insurance policy issued during the *Horton* class period. Smith did not opt out of the *Horton* settlement class.

C. The Transfer Motions

MetLife moved to transfer the *Coulter*, *Rostek*, *Smith* and *Corriere* cases to the *Horton* court under 28 U.S.C. § 1404(a). The motion stressed (*i*) the significant overlap between the *Coulter* putative "subclass," the *Rostek* putative class and the *Horton* settlement class, (*ii*) the Behrend firm's and various plaintiffs' extensive, voluntary participation in *Horton*, (*iii*) the *Horton* court's rulings that the Coulters and other plaintiffs were *Horton* class members, and (*iv*) the Corrieres' and Smith's apparent membership in the *Horton* class. Emphasizing the *Horton* court's retention of continuing jurisdiction, its permanent injunction order, and its appointment of a special master to resolve disputes about class membership, MetLife urged that the *Horton* court was the more appropriate and convenient forum to decide whether and to what extent the *Coulter*, *Rostek*, *Corriere* and *Smith* plaintiffs and putative class members were subject to the orders and judgment in *Horton*.

The District Court agreed. Without deciding whether petitioners were or were not *Horton* class members, and without ruling on any other substantive issues, the court exercised its discretion to transfer the four cases to the Middle District of Florida so the *Horton* court could decide questions about *Horton* class membership and the scope of the *Horton* judgment. The District Court concluded:

> This court ought not to sit in judgment of the actual decisions reached by its sister court in Florida with respect to the *Coulter* plaintiffs. Nor should this court accept plaintiffs' invitation to ignore the fact that the Florida court has retained jurisdiction to interpret the orders it entered in all cases which may involve *Horton* class members. Rule 1404(a) is addressed to concerns of judicial economy. This concern is implicated where, as here, resolution of the issues raised by plaintiffs in both the *Coulter* and *Rostek* actions necessarily involve[s] review of the scope of the proceedings undertaken in the Middle District of Florida, and the propriety of that court's orders. The most convenient, and appropriate, forum of litigating those issues is the United States District Court for the Middle District of Florida.

[Pet. App. 63a-64a (magistrate judge's report); *id.* 45a-46a (order adopting report as court's opinion).][2]

The District Court's ruling in *Smith* also cited the *Horton* court's appointment of a special master to decide issues relating to class membership—a process the Eleventh Circuit previously had approved on appeal, *see Grilli*, 78 F.3d at 1538-39. As the District Court observed:

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2. *Accord* Pet. App. 84a (magistrate judge's report in *Corriere*) ("the initial determination of whether the plaintiffs here are members of the *Horton* class, and whether they are bound by the orders entered in *Horton*, should be made by that court"); *id.* 74a (magistrate judge's report in *Smith*) (cases were transferred to *Horton* court "so that it can exercise the very jurisdiction which it has retained to determine, in the first instance, whether plaintiff is, in fact, barred by the *Horton* settlement"); *id.* 40a, 51a (orders adopting reports as court's opinions).

> A process has been established in th[e] [*Horton*] court [for determining class membership], and this court should not permit plaintiff and others to challenge the *Horton* settlement piecemeal in courts all over the nation. [Pet. App. 74a.]

The *Coulter*, *Rostek* and *Corriere* plaintiffs then asked the District Court to certify its transfer orders for interlocutory appeal under 28 U.S.C. § 1292(b).[3] The court denied the requests [App. 3a-5a], because the transfer orders did not involve any "controlling question of law," as § 1292(b) requires.

The court expressly rejected the contention that it had ruled against petitioners on any of the legal questions they had raised. For example, the court held it had "authority" to decide whether petitioners could make "collateral attacks on class action settlements in the forum of the Plaintiffs' choice," but concluded that

> this does not prevent a transfer pursuant to 28 U.S.C. § 1404(a), and my decision to transfer is not a ruling as a matter of law that no such authority exists. A ruling pursuant to § 1404(a) is a matter addressed to the discretion of the court. Thus, the decision in this case was discretionary, and not a question of controlling law. [App. 4a.]

Similarly, the District Court concluded that it had authority to rule on the *Horton* judgment's preclusive effect but that it nevertheless had exercised its discretion to allow the *Horton* court to make that determination:

> I determined that a discretionary transfer was warranted pursuant to 28 U.S.C. § 1404(a), and that, although I could address the questions presented, it would be more appropriate for the Florida court to do so. [*Id.*]

D. The Mandamus Petitions

The Behrend firm filed three mandamus petitions in the United States Court of Appeals for the Third Circuit (one for *Coulter*

3. Smith also sought § 1292(b) certification but then filed a mandamus petition before the District Court ruled on the request.

and *Rostek*, one for *Corriere*, and one for *Smith*) asking the court to order the District Court to vacate its transfer orders. The Court of Appeals denied all three petitions without comment.

Petitioners then filed a "Petition for Rehearing En Banc." The Court of Appeals, treating the petition as both a petition for panel rehearing and a suggestion for rehearing en banc, denied it. The Behrend firm's latest certiorari petition followed.

REASONS FOR DENYING THE WRIT

Petitioners' contentions that the Due Process Clause and the McCarran-Ferguson Act somehow bar the transfer of these cases to the *Horton* court are devoid of merit. The District Court's transfer orders were routine exercises of discretion that raise no substantial legal issues and impair no substantive rights. Neither the discretionary transfer orders nor the Third Circuit's discretionary denials of mandamus present any "important question of federal law that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c), and there is no reason to grant certiorari.

Petitioners' attempted "collateral attack" on *Horton* is nothing more than an abusive attempt to relitigate matters they and their counsel already litigated and lost. But regardless of whether a "collateral attack" is or is not available, arguments about the correctness of the *Horton* judgment are irrelevant to the rulings below. The transfer orders did not decide any substantive issues, so petitioners may raise in the Middle District of Florida any claims they could have raised in the Pennsylvania court. And petitioners' arguments lack merit in any event.

I.

THE DISTRICT COURT'S DISCRETIONARY TRANSFER ORDERS PRESENT NO IMPORTANT QUESTION OF LAW WARRANTING THIS COURT'S REVIEW.

A. The Due Process Clause Does Not Guarantee Petitioners an Unrestricted Choice of Venue for a "Collateral Attack."

Petitioners' primary argument is that they allegedly have a "constitutional right" to "collaterally attack" the *Horton* court's orders and judgment in any forum of their choice, and that this alleged right somehow overrides the District Court's authority to transfer a case under 28 U.S.C. § 1404(a) to promote the interests of justice, convenience, judicial economy, and respect for the rulings of a court of coordinate jurisdiction. Petitioners are wrong.

Petitioners' asserted due-process right to challenge the adequacy of representation in *Horton* is not at issue here. The only question is whether petitioners have a constitutional right to insist that a *particular* federal court hear that challenge, even when the court in which the challenge has been raised believes, in its discretion, that another court is the more appropriate forum to decide the issue.

It is beyond question that Congress has broad power to establish lower federal courts, allocate jurisdiction among them, and enact laws regulating the conduct of litigation in those courts. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 207 (1993); *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992). One of those laws is § 1404(a), which empowers district courts to transfer cases to other districts when "the interest of justice" would be served by doing so. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31-32 (1988).

In light of § 1404(a), petitioners cannot claim any constitutional right to *require* a particular federal court to hear a dispute even when the court believes § 1404(a)'s considerations point to another court. Due process requires only an "opportunity to be heard," *e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)—not an opportunity to forum-shop.

Indeed, if petitioners' argument were correct, no federal court ever could transfer a case under § 1404(a) if a plaintiff objected. *Every* plaintiff could insist he or she had a "constitutional right" to be heard in his or her chosen forum, regardless of whether the same issues could be litigated elsewhere, and regardless of whether the interests of justice favored a transfer. This view of the Due Process Clause obviously is not the law.

Nor have petitioners offered any reason why "collateral attacks" on class-action judgments should be uniquely exempted from the change-of-venue statute applicable to all other cases. As the Second Circuit held in *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994):

> [N]othing in the Constitution or in our jurisprudence demands that class members have an unchallengeable choice of forums in which to launch [an attack on a class-action judgment]. While the law as a general rule permits a plaintiff to choose his forum, that freedom is not absolute, as the removal, venue and multidistrict litigation statutes and the personal jurisdiction and forum non conveniens doctrines all demonstrate.

996 F.2d at 1432 (affirming injunction against class members' attempts to collaterally attack federal class-action settlement in Texas state courts).[4]

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4. Petitioners' contention that their "collateral attack" exempts them from the ordinary rules governing transfer of venue rests almost entirely on their misreading of a single Third Circuit case, *In re Real Estate Title & Settlement Services Litigation*, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989), which held that a District Court should not *enjoin* members of a *non-opt-out* class from collaterally attacking a federal class-action settlement in state court if those persons lacked minimum contacts with the class-action forum. That decision, however, has nothing to do with an order *transferring* cases filed by persons who (*i*) are members of a certified *opt-out* class, (*ii*) did *not* exercise their right to exclude themselves from the class, (*iii*) appeared and objected through counsel in the court that had certified the class action, and (*iv*) actually litigated and lost their arguments at each level.

The District Court's transfer orders did not decide whether petitioners are class members. Nor did the orders determine the preclusive effect of the *Horton* judgment. Nor did the court make any other substantive rulings on petitioners' claims. Because petitioners remain free to raise whatever arguments they wish in the Middle District of Florida (subject, of course, to the same preclusion principles that would have applied in Pennsylvania), the transfer orders do not impair their alleged right to litigate the merits of their "collateral attack." Petitioners' due-process argument thus is without merit.

B. The McCarran-Ferguson Act Did Not Require the District Court to Deny the Transfer Motions.

Petitioners also contend [at 28-29] that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, requires the application of Pennsylvania law to their claims and therefore precluded the transfers. Like the due-process argument, this contention is irrelevant to the transfer orders.

As the very cases cited by petitioners demonstrate, the transfer of these actions does not change the applicable substantive law. *E.g., Ferens v. John Deere Co.*, 494 U.S. 516 (1990) (after § 1404(a) transfer, transferee forum must apply transferor forum's choice-of-law rules); *Van Dusen v. Barrack*, 376 U.S. 612 (1964) (same). Any issues governed by Pennsylvania law in the transferor forum will continue to be governed by Pennsylvania law in the transferee forum.

Thus, even if petitioners were correct that the McCarran-Ferguson Act entitled them to have Pennsylvania law applied to their claims (*but see infra* pp. 25-26), the transfer would not in any way impair that alleged right. The McCarran-Ferguson Act nowhere suggests that, where Pennsylvania law applies, it must be applied in Pennsylvania by a Pennsylvania court.

II.

THE COURT OF APPEALS ACTED WITHIN ITS DISCRETION IN DENYING MANDAMUS TO REVIEW THE DISCRETIONARY TRANSFER ORDERS.

Not only do the discretionary transfer orders fail to present any substantial question worthy of review; the Third Circuit's refusal to grant extraordinary mandamus relief was itself an exercise of discretion that does not call for a grant of certiorari.

Mandamus is an extraordinary remedy available only in circumstances "amounting to a judicial usurpation of power." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quotation marks omitted). The party seeking mandamus must show that there is no adequate alternative means of relief and that the "right to issuance of the writ is 'clear and indisputable.'" *Helstoski v. Meanor*, 442 U.S. 500, 505 (1979). Moreover, even when the prerequisites for mandamus are satisfied, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed"—here, the Court of Appeals. *Id.*

Petitioners certainly do not have any "clear and indisputable" right to an exemption from § 1404(a) merely because they seek to "collaterally attack" a class-action judgment. Moreover, because the transfer orders did not decide petitioners' substantive claims, petitioners have an adequate remedy in the Middle District of Florida and, if appropriate, in the Eleventh Circuit. The Third Circuit's denial of mandamus thus was clearly within that court's discretion and presents no important legal issues for this Court's consideration.

In addition, mandamus would not have been appropriate to overturn the District Court's fact-specific, discretionary transfer determinations. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) ("Where a matter is committed to [the trial court's] discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable'"). This Court has held that § 1404(a) invests the District Courts with broad discretion to "adjudicate motions for transfer according to an individualized,

case-by-case consideration of convenience and fairness" and "to weigh in the balance a number of case-specific factors." *Stewart Org.*, 487 U.S. at 29 (quotation marks omitted). The District Court here merely exercised that discretion based on its analysis of the unique facts of these particular cases.

Contrary to petitioners' repeated assertions, the District Court did not grant the motions because it felt it lacked the power to adjudicate petitioners' claims. Rather, the court transferred the cases because it believed, in its discretion, that transfers were *appropriate* in light of § 1404(a)'s considerations and the *Horton* court's rulings. As the court explained in declining to certify its orders for interlocutory appeal under 28 U.S.C. § 1292(b):

> Plaintiffs assert that they are entitled to collaterally attack a class action settlement, such as the *Horton* settlement, in the forum of their choice, and that this is the controlling question of law involved in this case. . . . Plaintiffs argue that I ignored precedent which permits such collateral attacks on class action settlements to be made in the forum of the Plaintiffs' choice. Indeed, *I have the authority to reach such questions*. . . . In my view, however, this does not prevent a transfer pursuant to 28 U.S.C. § 1404(a), and *my decision to transfer is not a ruling as a matter of law that no such authority exists*. A ruling pursuant to § 1404(a) is a matter addressed to the discretion of the court. Thus, *the decision in this case was discretionary*, and not a question of controlling law. [App. 4a (emphasis added; citation omitted).]

Petitioners' contention [at 15] that the District Court "found it could not entertain a collateral attack on the class action rulings of a non-Pennsylvania court" thus misstates the court's orders.

The District Court clearly did not abuse its discretion in so ruling. Courts throughout the country repeatedly have held that transferring later-filed cases such as these to another District Court is appropriate where, as here, the other court is exercising continuing

jurisdiction over the subject matter of the later-filed actions.[5] Indeed, eight other federal district judges have transferred to the *Horton* court ten other cases filed by litigants who appeared to be *Horton* settlement class members. As one of those courts explained,

> [t]he *Horton* Court is more familiar with the issues surrounding the certification of the *Horton* class. The *Horton* court additionally retained jurisdiction over subsequent actions impacting upon the *Horton* settlement. It is therefore in the interest of judicial economy that this case be transferred to Florida. . . .

Taylor v. Metropolitan Life Ins. Co., No. 95-0933-BH-S (S.D. Ala. Feb. 1, 1996).[6]

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5. *E.g., In re "Agent Orange" Prod. Liab. Litig.*, 996 F.2d at 1431 (affirming removal and transfer of cases to federal court that had settled prior class action, so that court could determine plaintiffs' membership in settlement class); *Carver v. Knox County*, 887 F.2d 1287, 1289-93 (6th Cir. 1989) (transferring class members' claims to court hearing previously filed class action), *cert. denied*, 495 U.S. 919 (1990); *Spears v. Johnson*, 859 F.2d 853, 855 (11th Cir. 1988) (transferring class member's case to another court with continuing jurisdiction over class action), *vacated in part on other grounds*, 876 F.2d 1485 (11th Cir. 1989); *West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728-29 (5th Cir. 1985) (holding that District Court should have dismissed or stayed action or transferred it to court hearing pending action involving closely related issues); *Gregory-Portland Indep. School Dist. v. Texas Educ. Agency*, 576 F.2d 81, 82 (5th Cir. 1978) (court should have transferred action to other District Court because case involved latter court's orders and continuing jurisdiction), *cert. denied*, 440 U.S. 946 (1979); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-08 (5th Cir. 1971) (where one District Court has been adjudicating issues and has enjoined litigation of related matter in second court, second court must either transfer related suit to first court or dismiss case); *see also Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1487-88 (D.C. Cir. 1992) (court in which settlement class member had collaterally attacked judgment "properly declined to consider [plaintiff's] argument" but "might have entertained a timely motion to transfer" to class action forum).

6. *Accord Dailey v. Metropolitan Life Ins. Co.*, No. 1:97-0008-RV-S (S.D. Ala. June 13, 1997); *Jones v. Metropolitan Life Ins. Co.*, No. 96-A-754-S (M.D. Ala. Nov. 7, 1996); *Hanlon v. Metropolitan Life Ins. Co.*, No. 1:96 CV 1349 (N.D. Ohio July 22, 1996); *Singleton v. Metropolitan Life Ins. Co.*, No. 96-0309-

(continued...)

There is also no basis for petitioners' contention [at 10] that the transfer orders will require any trial on the merits to be held in Florida. If the *Horton* court determines that any of petitioners' claims are not precluded by the *Horton* judgment and that the parties' convenience and the interests of justice favor trying those claims in Pennsylvania, the court will have the discretion to transfer the cases back to the Western District of Pennsylvania.

For all these reasons, the District Court's discretionary use of § 1404(a) to promote judicial efficiency and comity among the federal courts was entirely appropriate. And the Third Circuit certainly did not abuse its discretion in refusing to issue extraordinary writs of mandamus to vacate the discretionary transfer orders.

III.

PETITIONERS' ATTACK ON THE *HORTON* JUDGMENT IS IMPROPER, IRRELEVANT AND MERITLESS.

A. The *Horton* Judgment Is Not Properly Before This Court.

Petitioners devote much of their petition [at 15-20, 25-29] to contesting the *Horton* court's judgment and arguing they should not be bound by it. Those issues, however, are not properly before this Court.

The District Court did not rule on the *merits* of petitioners' attack on *Horton*. The court simply concluded that the Florida court was in a better position to decide those issues.[7] The Court of Appeals

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6. (...continued)
AH-C (S.D. Ala. June 21, 1996); *Helton v. Metropolitan Life Ins. Co.*, No. 95-0934-BH-S (S.D. Ala. Feb. 1, 1996); *Hunter v. Metropolitan Life Ins. Co.*, No. 95-0935-BH-S (S.D. Ala. Feb. 1, 1996); *Harrison v. Metropolitan Life Ins. Co.*, No. CV 95-B-2044-NW (N.D. Ala. Dec. 5, 1995); *Sutton v. Metropolitan Life Ins. Co.*, No. 2:95-CV-308 (E.D. Tenn. Nov. 17, 1995); *Ladnier v. Metropolitan Life Ins. Co.*, No. 95-0300-B-C (S.D. Ala. Apr. 14, 1995).

7. *See* Pet. App. 83a ("I do not believe . . . that the merits of these arguments should be reached by this court. Rather, the initial question is which court ought to address the merits of these arguments"); *id.* 74a ("The remaining (continued...)

also did not reach the merits; it merely exercised its discretion to deny mandamus to overturn the transfer orders.

Petitioners' purported right to "collaterally attack" the *Horton* judgment thus has not yet been decided. If petitioners and the Behrend firm continue to litigate their claims and lose, they can appeal any final judgment to the Eleventh Circuit and then petition this Court for certiorari. Until then, they have no jurisdictional basis to raise the issue in this Court.

B. Res Judicata Precludes Petitioners' Attack on the *Horton* Judgment.

In any event, however, there is no merit to petitioners' claim of a broad right of "collateral attack" that allows them to reopen all the class certification issues they and their attorneys litigated and lost in the *Horton* case. Thus, a grant of certiorari would be inappropriate even if those issues had been decided below.

It is beyond dispute that a class-action judgment is binding on all class members and precludes relitigation if those persons were adequately represented. *See, e.g., Shutts*, 472 U.S. at 808 ("The absent [class members] would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest"); *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) ("there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it"). As *Hansberry* declared,

> members of a class not present as parties to the litigation may be bound by the judgment *where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which*

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7. (...continued)
arguments raised by plaintiff need not be addressed on their merits. The real question is whether this court or the Florida court should address them"); *id.* 64a ("The most convenient, and appropriate, forum of litigating those issues is the . . . Middle District of Florida").

> *members of the class are present as parties,* or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason *the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.*

Id. at 42-43 (emphasis added; citations omitted).

Here, petitioners' attorneys "actually participate[d] in the conduct" of the *Horton* action on behalf of numerous clients, including the Coulters, Daughenbaugh and Hemcher. *Id.* at 43. Petitioners cannot now invoke "adequacy of representation" as a way to avoid the *Horton* judgment.

Moreover, *Horton* class members such as petitioners were adequately represented in the class action even without the Behrend firm's participation. The *Horton* court expressly

> reject[ed] the Coulters' argument that [the *Horton*] plaintiffs cannot or will not adequately represent their interests. The Coulters' interests are the same as those of the settlement class: they all claim to have been misled by the same types of sales solicitations used to sell whole life insurance as retirement and/or savings plans or vehicles. [Pet. App. 128a, ¶ 46.]

Petitioners' assertion [at 18] that "[t]he Tampa Court made no pretense that the interests of the Pennsylvania petitioners were being adequately represented" thus misrepresents the record.

Not only were petitioners actually and adequately represented in *Horton*; they also had ample opportunity to opt out of the class if they were dissatisfied with either their representation or the proposed settlement. As the *Horton* court observed:

> This Court's April 22, 1994 Order . . . allowed the Coulters—and any other dissatisfied Pennsylvania residents within the settlement class—to opt out of the settlement class and litigate elsewhere if they chose to do so. . . . In the

> alternative, the Court's order gave the Coulters the opportunity to remain in this class action and object to the settlement, and to appear at the fairness hearing themselves or through their own attorney. . . . As settlement class members, the Coulters already had the right to opt out of the settlement class or appear through counsel. Thus, denial of the intervention motion would in no way prevent them from protecting their rights.

[Pet. App. 126a-127a, ¶¶ 43-45.]

Instead of opting out, however, the Behrend firm and its clients fully used (indeed, abused) their opportunity to participate. They filed objections to the settlement, challenging—among other things—adequacy of representation [*see, e.g.*, Pet. App. 230a, ¶ 25], and they appeared and argued at the settlement hearing [*id.* 127a, ¶ 44; App. 12a, ¶ 21]. The *Horton* court fully considered and rejected these objections on the merits, including the "adequacy of representation" issue. [App. 17a, ¶ 39; Pet. App. 128a, ¶¶ 46-47.]

The Behrend firm and its clients then prosecuted four unsuccessful—indeed, "frivolous"—appeals to the Eleventh Circuit, and then unsuccessfully sought certiorari. In light of this record, petitioners' assertion [at 19] that they were not "allowed" to "challenge the adequacy of their representation" is preposterous.

In addition to having already litigated and lost the adequacy-of-representation issue, the Behrend firm and its clients also litigated and lost the other arguments they now seek to relitigate, such as their arguments about Pennsylvania law. Petitioners and their counsel specifically contended in *Horton* that "[t]he Coulter Class and sub-class members . . . are entitled to the application of Pennsylvania law to their causes of action" [Pet. App. 224a, ¶ 10]. The *Horton* court "considered and rejected" these arguments [App. 17a, ¶ 39], holding that the contention about Pennsylvania law was "unfounded" in the context of a settlement, because a court does not decide claims in reviewing a settlement [Pet. App. 132a, ¶ 53]. *See infra* pp. 25-26.

Petitioners' counsel also argued in *Horton* that the proposed class did not meet the requirements of Fed. R. Civ. P. 23. [*E.g.*, Pet. App. 227a-230a, ¶¶ 22-25.] The *Horton* court considered and rejected this argument as well, concluding that the settlement class met all of Rule 23's requirements [App. 15a, ¶ 34; Pet. App. 128a-129a, ¶ 47] and that the Coulters were settlement class members [Pet. App. 126a-127a, ¶¶ 43, 45].

Petitioners thus cannot pretend to be strangers to the *Horton* litigation. Their own attorneys—and some of the petitioners themselves—previously raised the same arguments asserted here, and they lost at every level. Having had a full and fair opportunity to be heard in the *Horton* court and on appeal, petitioners now are bound by the *Horton* judgment. *See, e.g.*, *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558-61 (3d Cir.) (class members who had chance to object to adequacy of representation at settlement hearing were precluded from relitigating issue), *cert. denied*, 513 U.S. 986 (1994); *Laskey v. International Union, UAW*, 638 F.2d 954, 957 (6th Cir. 1981) (similar); *see also Hansberry*, 311 U.S. at 43 (due process does not prevent class judgment from being binding on class members as long as "the procedure [was] so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue").

Petitioners' mere disagreement with the *Horton* court's and the Eleventh Circuit's rulings does not permit them to ignore the fundamental "rule . . . of public policy and private peace" "that there be an end of litigation [and] that those who have contested an issue shall be bound by the result of the contest." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981) (quotation marks omitted). Having litigated and lost at every juncture in the *Horton* case, petitioners and their attorneys do not have any constitutional right to start all over again in another judicial Circuit.

C. The McCarran-Ferguson Act Did Not Bar the *Horton* Settlement.

Not only are petitioners' and their attorneys' criticisms of the *Horton* settlement precluded; they also are groundless. Petitioners' principal argument [at 28] appears to be that the McCarran-Ferguson Act—which declares that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation . . . of such business," 15 U.S.C. § 1012(a)—should have prevented certification of the *Horton* class. This contention misconstrues the effect of the *Horton* settlement.

The *Horton* settlement does not intrude on the states' role in regulating the business of insurance. It simply provides for the compromise and settlement of certain *existing* claims in exchange for the refund of net premiums plus interest or the issuance of new annuity contracts. [*See* App. 7a-8a, ¶¶ 5-6.] The settlement does not prescribe any standards for insurance transactions and does not regulate the sale of insurance policies. Nor does it involve any continuing relief applicable to future insurance sales. It affects only claims arising from certain insurance policies purchased by class members before October 31, 1993. [*Id.* 8a, ¶ 8(a).]

Moreover, nothing in the *Horton* settlement purports to exempt MetLife from state insurance laws or to impair state regulators' ability to enforce them. In fact, the insurance regulators from virtually every state in the country approved the terms of the settlement [App. 21a, ¶ 51], and counsel for the Florida Department of Insurance appeared at the settlement hearing to testify in favor of it [Plaintiffs' Mandamus Ex. 5 at 7-8, 26-27, 44-45, 101-04, 195-98]. Petitioners' argument [at 28-29] that the settlement somehow "violated" the "national policy that the insurance industry is subject to State laws and regulations" thus is specious.

Contrary to petitioners' assertion [at 28], the *Horton* court did not "issue[] a uniform nationwide injunction affecting the marketing of insurance policies." The injunction to which petitioners refer merely enjoins class members from litigating civil actions barred by the *Horton* judgment in any forum other than the Middle District of

Florida. [Pet. App. 117a, ¶ 6.] It says nothing whatsoever about the marketing of insurance. [*See id.* 113a-118a.]

Petitioners' contention [at 22] that the *Horton* court erred by not "applying" Pennsylvania insurance law to their claims is equally meritless. The *Horton* case was *settled*. It was not litigated to judgment on the merits. The court thus had no occasion to "apply" Pennsylvania law—or any other particular law—to the merits of plaintiffs' claims. [*See* Pet. App. 132a, ¶ 53.][8]

However, if petitioners mean the *Horton* court did not *consider* the merits of their Pennsylvania-law arguments in determining the propriety of class certification and the fairness of the settlement, that contention is untenable. As discussed above, the Behrend firm and the other parties extensively briefed the substantive issues in the case, and the *Horton* court fully considered them. [*See, e.g.*, App. 13a-15a, 20a, ¶¶ 26, 32, 44 (discussing how merits of plaintiffs' claims bear on fairness of settlement).] The court rejected all of the Behrend firm's arguments [App. 17a, ¶ 39], including the erroneous contention that differences between Pennsylvania law and the laws of other states required excluding Pennsylvania residents from the settlement class [*e.g.*, Pet. App. 225a-226a, 230a, ¶¶ 13-15, 25].[9]

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8. *See also, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir.) ("The court need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements") (quotation marks omitted), *cert. denied*, 506 U.S. 953 (1992); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977) ("in evaluating the terms of the compromise in relation to the likely benefits of a successful trial, the trial judge ought not [to] try the case in the settlement hearings").

9. For this reason, the cases petitioners cite [at 16-17] are inapposite. Those cases do not say that *any* differences in state law will preclude class certification; they hold only that the trial court should *consider* those differences in determining, under Rule 23(b)(3), whether common questions predominate and whether a class action is superior to other methods of adjudication. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996) (reversing class certification where

(continued...)

Contrary to petitioners' assertion, there is no inconsistency between the *Horton* settlement relief and the remedies petitioners say would have been available under Pennsylvania law. The purported Pennsylvania-law remedies—punitive or treble damages—also were potentially available for the same conduct under the RICO, statutory or common-law theories pleaded in *Horton*. Petitioners therefore cannot demonstrate any conflict of interest between the Pennsylvania class members and the rest of the class. The settlement for full restitution plus interest was equally fair and adequate under the laws of every state, as the *Horton* court found.

D. Petitioners' Other Attacks on the *Horton* Settlement Are Also Baseless.

Petitioners' reliance [at 17] on the Third Circuit's decision in *Georgine v. Amchem Products*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom. Amchem Prods. v. Windsor*, No. 96-270, 1997 U.S. LEXIS 4032 (June 25, 1997), is equally unavailing. As this Court confirmed in *Windsor*, the *Horton* court was not required to ignore the proposed settlement in considering whether to certify the class under Rule 23(b)(3). 1997 U.S. LEXIS 4032, at *50-51.

Moreover, the *Horton* class bears no resemblance to the one certified in *Windsor*. The members of the *Horton* class, unlike the *Windsor* personal-injury class members, all allegedly suffered the same general kind of purely economic harm: they all paid money for policies that purportedly had been misrepresented to them, and their losses were easily quantifiable.

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9. (...continued)
District Court "failed to *consider* how variations in state law affect predominance and superiority") (emphasis added); *In re American Medical Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996) (decertifying class where District Court "failed to *consider* how the law of negligence differs from jurisdiction to jurisdiction") (emphasis added); *see also Valentino v. Carter-Wallace Inc.*, 97 F.3d 1227 (9th Cir. 1996) (reversing provisional class certification entered without any record showing compliance with Rule 23's requirements); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir.) (citing differences among states' negligence laws as reasons for decertifying class, in light of unmanageability of accurately instructing jury on laws of all 50 states), *cert. denied*, 116 S. Ct. 184 (1995).

In addition, the *Horton* settlement did not pose any of the risks of intraclass conflicts that caused concern in *Windsor*. The *Horton* settlement offered full relief (restitution of net premiums plus interest) to each individual class member, without any caps or any conflicts in allocation among class members. Also, the *Horton* plaintiffs, unlike the ones in *Windsor*, filed their action fully intending to litigate it. The *Horton* settlement class thus did not have any of the structural problems that otherwise might have prevented the class representatives from adequately representing the entire class.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 14, 1997

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STATUTORY AND OTHER PROVISIONS

Title 28, United States Code

§ 1404. Change of Venue

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

. . . .

United States Constitution

Amendment V.

No person shall . . . be deprived of life, liberty, or property, without due process of law.

McCarran-Ferguson Act §§ 1-2, 15 U.S.C. §§ 1011-1012

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE THE METROPOLITAN LIFE INSURANCE COMPANY SALES PRACTICES LITIGATION	Master Docket No. 96-179 MDL No. 1091 Judge D.W. Ambrose Magistrate Judge Benson
THIS DOCUMENT RELATES TO:	
COULTER v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-0629	
and	
ROSTEK v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 94-1108	
and	
CORRIERE v. METROPOLITAN LIFE INSURANCE COMPANY, Civil Action No. 96-0833	

MEMORANDUM ORDER OF COURT

Plaintiffs Coulter (94-0629), Rostek (94-1108) and Corriere (96-0833) have filed Motions to Amend Interlocutory Order Granting Defendant's Motion to Transfer (Docket #: 23 at No. 96-0833 and Docket #: 105 at Nos. 94-0629 and 94-1108), seeking an amendment of the Order so that an appeal from the Orders, which are interlocutory, may be requested.

An interlocutory order should be certified for appeal where the order "involves a controlling question of law as to which there is

substantial ground for difference of opinion. . . ." 28 U.S.C. § 1292(b). No such controlling question is presented by the Orders at issue here.

Plaintiffs assert that they are entitled to collaterally attack a class action settlement, such as the *Horton* settlement, in the forum of their choice, and that this is the controlling question of law involved in this case. Plaintiffs wish to assert that they are not members of the class, that the class was improperly certified, and that they were not adequately represented in the Florida action. Plaintiffs argue that I ignored precedent which permits such collateral attacks on class action settlements to be made in the forum of Plaintiffs' choice. Indeed, I have the authority to reach such questions. *In re Real Estate Title & Settlement Services Antitrust Litigation*, 869 F.2d 760 (3d Cir. 1989). In my view, however, this does not prevent a transfer pursuant to 28 U.S.C. § 1404(a), and my decision to transfer is not a ruling as a matter of law that no such authority exists. A ruling pursuant to § 1404(a) is a matter addressed to the discretion of the court. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 883 (3d Cir. 1995). Thus, the decision in this case was discretionary, and not a question of controlling law.

If, in fact, my ruling had been made on the basis that I lacked jurisdiction to address the adequacy of the class settlement, then Plaintiffs would have a point. Here, however, I determined that a discretionary transfer was warranted pursuant to 28 U.S.C. § 1404(a), and that, although I could address the questions presented, it would be more appropriate for the Florida court to do so. If my power to transfer were questioned, then perhaps certification would be appropriate. *See*, *Wilkins v. Erickson*, 484 F.2d 969 (8th Cir. 1973) (when issue is power of court to transfer, as opposed to discretionary ruling, then certification would be appropriate). Thus, there is no controlling question of law involved in this matter. Rather, there is a discretionary ruling that does not involve a controlling question of law.

Therefore, this **4th** day of December, 1996, it is **ORDERED** that the Motions of Plaintiffs Coulter, Rostek and Corriere to Amend

Interlocutory Order Granting Defendant's Motion to Transfer (Docket #: 23 at No. 96-833 and Docket #: 105 at #s: 94-629 and 94-1108) are **DENIED.**

BY THE COURT:

/s/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge

[Names and addresses of counsel omitted in printing.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING FAIRNESS OF CLASS ACTION SETTLEMENT

Before the Court is a joint motion by the named plaintiffs and the defendant, Metropolitan Life Insurance Company ("MetLife"), for approval of the proposed settlement in this action. (Docket No. 35.) This motion has been fully briefed, supported by affidavits, testimony and documents in the record, and was the subject of a full day hearing on July 18, 1994.

Based on these submissions, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Background

1. On November 1, 1993, the named plaintiffs filed their Class Action Complaint and Jury Demand. An amended complaint followed on November 19, 1993, with a second amended complaint on February 14, 1994 (the "*Horton* Complaint"). The *Horton* Complaint asserted claims based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 ("RICO"), the Florida

Civil Remedies for Criminal Practices Act, Fla. Stat. § 772.103(1), and the common law of fiduciary duty and fraud. The Complaint sought rescission, restitution, treble damages, punitive damages and attorneys' fees and costs.

2. The central claim in this lawsuit is that certain agents of MetLife allegedly made oral or written sales solicitations to sell whole life insurance as retirement and/or other savings plans or vehicles without fully disclosing that the product sold was life insurance.

3. The lawsuit was filed in the wake of inquiries into similar allegations by the insurance departments of Florida and other states. (*See* Affidavit of Alan Neiditch, sworn to June 27, 1994, ¶¶ 3-5, Docket No. 111.)

Preliminary Court Orders

4. Before any responsive pleadings were filed, the parties entered into a Settlement Agreement on April 4, 1994 (the "Agreement").[1]

5. The proposed settlement offers settlement class members whose whole life policies are still in force the choice of:

- a cash refund of all premiums paid by the settlement class member (less any amounts already paid to him or her by MetLife, such as loans or refunds) plus interest at a rate based on MetLife annuity interest rates (including the effect of compounding);
- an annuity funded in the amount of all premiums paid (less any amounts already paid by MetLife, such as loans or refunds) plus interest; or
- the continuation of their policies.

To class members whose policies are no longer in force, the proposed settlement offers the cash refund. (Agreement ¶¶ 5(b), 5(d), 5(o), 6.)

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1. The Settlement Agreement is attached as Exhibit 1 to the parties' joint motion. It is cited herein as "Agreement" followed by the relevant paragraph number.

6. The proposed settlement also provides that MetLife would pay fees and expenses of settlement class counsel as provided in the Agreement, over and above any amount paid to settlement class members, as well as the administrative costs of implementing the settlement, including the fees of the Court appointed Claims Administrator and the costs of producing and mailing the individual notice and publishing the publication notice. (Agreement ¶¶ 17-18.)

7. On April 12, 1994, plaintiffs and MetLife filed a joint motion seeking an Order certifying a settlement class, appointing settlement class counsel, preliminarily approving the proposed settlement, approving the form of notice to the settlement class, and scheduling a hearing date for the Court to evaluate the settlement.

8. After hearing argument on the motion on April 19, 1994, the court issued an Order on April 22, 1994 (Docket No. 48), *inter alia*,

(a) certifying as a class under Fed. R. Civ. P. 23(b)(3), solely for the purpose of settlement:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993;

(b) designating settlement class counsel;

(c) preliminarily approving the settlement as sufficiently reasonable, adequate, and fair to warrant notice to the members of the settlement class and a full hearing on the settlement;

(d) scheduling a full hearing on the settlement;

(e) approving the form of notice and accompanying claim form;

(f) approving individual notice to an overly inclusive group of potential settlement class members consisting of: (i) all whole life policyholders who purchased from the Rick Urso & Associates sales office (the "Tampa office") between January 1, 1988 and October 31, 1993; and (ii) certain policyholders who purchased from MetLife's other offices between January 1, 1990 and October 31, 1993, and who were identified statistically as likely to be class members, or were identified empirically (through a survey of MetLife's sales offices and a review of sales literature) as likely to be class members, or complained of sales solicitations similar to those alleged in the *Horton* Complaint; and

(g) approving publication notice in 10 daily newspapers throughout the United States and in two monthly nursing magazines.

9. On April 22, 1994, the Court issued an Order, with the consent of MetLife and settlement class counsel, permitting intervention by the Florida Insurance Commissioner. (Docket No. 47.)

10. On June 14, 1994, the Court issued an Order, pursuant to Fed. R. Evid. 706, appointing an insurance expert for the purpose of analyzing the proposed settlement to assist the Court in evaluating the settlement. (Docket No. 96.) The expert provided consultation to the Court without the filing of a formal report in the court record.

Notice and Response

11. The individual notice was written in plain English and included (i) the caption, (ii) a description of the litigation, (iii) a description of the settlement class, (iv) identification of counsel for the class, (v) notification of the option to enter an appearance personally or through other counsel and the deadline for doing so, (vi) a description of the settlement, (vii) the procedure for filing objections, (viii) the hearing date, (ix) the procedure for filing requests for exclusion and the deadline for doing so, (x) the consequences of filing an exclusion request, (xi) the consequences of remaining in the settlement class, (xii) the consequences if the settlement is or is not

approved by the Court, (xiii) a description of MetLife's responsibility for attorneys' fees and (xiv) the procedure for obtaining additional information. Potential settlement class members with in force policies, who might have been concerned about their policies as a result of the notice, also received a letter from MetLife assuring them that their policies are valid and that MetLife is financially secure. (Ex. A to the Affidavit of G. Peter Buchband, sworn to July 18, 1994, Docket No. 149.)

12. The Proof of Claim form was written in plain English. It required those settlement class members who sought to make a claim to certify the truth of the following statements:

a. I purchased a MetLife whole life insurance policy that was sold to me as a retirement and/or savings plan or vehicle.

b. At or prior to the time that I made the purchase, I received from a MetLife representative a sales solicitation that did not fully disclose to me that the product I would receive was a life insurance policy.

c. I was misled by this sales solicitation, and I did not understand that I was buying a life insurance policy at the time I bought it.

(Proof of Claim Form at 1.) In addition, the Proof of Claim form (i) required a notarized signature, (ii) asked which settlement option the class member wished to elect, (iii) requested surrender of the policy and (iv) contained a release.

13. The publication notice contained (i) a description of the litigation and the settlement class, (ii) a description of the settlement, (iii) procedures for filing a request for exclusion and the deadline for doing so, (iv) the hearing date and (v) the procedures for obtaining further information and a Proof of Claim.

14. The group proposed by the parties and approved by the Court to receive individual notice is likely to include the vast majority of settlement class members. The methodology for identifying this group was necessary because there is no direct way to identify

policyholders based on the type of solicitation they received. (Affidavit of Anthony Amodeo, sworn to April 12, 1994, ¶ 5, Docket No. 40.) This methodology was the best means of identifying settlement class members through reasonable efforts and was developed in consultation with, and accepted by, both class counsel and insurance regulators. (Transcript, R. Parry at 98-99; T. Tew at 101-03; Neiditch Aff. ¶ 9.)

15. Individual notice was sent to approximately 71,000 potential settlement class members by the Court appointed Claims Administrator. Of these, a total of 730 (1.0%) were returned undeliverable. (Buchband Aff. ¶¶ 4, 23.)

16. Notices were published in the May 9, 1994 and the May 14, 1994 issues of *USA Today*, *New York Daily News*, *Los Angeles Times*, *Chicago Sun-Times*, *Philadelphia Inquirer*, *Pittsburgh Post Gazette*, *Miami Herald*, *Atlanta Journal and Constitution*, *Dallas Morning News*, *Houston Chronicle*, and *Tampa Tribune*; in the May 9, 1994 issue of the *Birmingham News*; and in the June issues of the *American Journal of Nursing* and *RN Magazine*. These publications on the dates published had a circulation of over 7 million. (*See* Affidavits of Charles Alexander, sworn to July 1 & 18, 1994, Docket Nos. 145 and 149.)

17. As of the hearing date, the Claims Administrator had received a total of 20,706 timely claim forms (29.2% of claim forms mailed) and 513 timely requests for exclusion (0.7% of individual notices mailed). (Buchband Aff. ¶¶ 20, 21, 23.) The Court has directed the parties to meet and agree on the treatment of late filings and, if no agreement can be reached, to submit these issues to the Court by motion.

18. Only two settlement class members filed timely objections to the settlement.

19. In addition, certain other persons attempted to appear and object. However, their motions were denied as follows:

(a) The motion to intervene (Docket No. 64) by certain former MetLife sales managers — Julio Gonzalez-Roel, Kevin P.

McCarron, John C. Garcia, Vincent P. Beilman, III, and John A. Ferrandes ("the former sales managers") — was denied.

(b) The motion to intervene (Docket No. 77) by Ronald and Anissa Coulter (the "Coulters") was denied. The Coulters also filed a notice of intention to appear and object (Docket No. 119) on July 1, 1994. This objection was untimely, although this untimeliness does not affect their status as settlement class members. Pursuant to this Court's April 22, 1994 Order, objections and supporting memoranda were due to be filed on or before June 13, 1994. (Docket No. 48, ¶ 10.)

(c) The motion filed by the named plaintiffs (Docket No. 106) to dismiss the notices of intention to appear and object to proposed class settlement filed by the former sales managers (excluding Mr. Ferrandes), by Kevin J. Daxon ("Daxon"), and by Daniel Richard Urso ("Urso") was granted. Specifically, Daxon's notice of intention to appear and object (Docket No. 89) was dismissed for lack of standing. Urso's notice of intention to appear and object (Docket No. 94) was dismissed for lack of standing. The former sales managers' notice of intention to appear and object (Docket No. 58) was dismissed by stipulation that the former sales managers are not settlement class members.

(*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Final Settlement Hearing

20. On July 18, 1994, the Court conducted a full day hearing on the fairness of the settlement and related issues, which the parties had fully briefed.

21. At the hearing, the Court heard and considered the objections of the two settlement class members who objected in a timely fashion, the former sales managers, the Coulters, Urso and Daxon before disposing of the motions as described above.

22. At the hearing, class counsel called as a witness David Donaldson, an experienced plaintiffs' class action lawyer from the Ritchie & Rediker firm in Birmingham, Alabama, who testified that the settlement was fair and that the form of individual notice was clear and easily understood. (Transcript, Donaldson at 136-38.) Class counsel had previously filed an affidavit of Mr. Donaldson's partner, David Guin (Docket No. 143), reflecting his view that the settlement was fair.

23. At the hearing, MetLife called as a witness Daniel J. McCarthy, a consulting actuary with the firm of Milliman & Robertson, experienced in life insurance matters, who explained features of the settlement and testified that the settlement, including each of the settlement options as well as the interest rate, was fair and that the individual notice was likely to reach the vast majority of the settlement class. (Transcript, McCarthy at 177-94.)

24. MetLife has committed and confirmed at the July 18, 1994 hearing (*see* Transcript at 200) that it will either (i) provide Restitution (as defined in the Settlement Agreement) to class members who withdrew from the Florida Prepaid Tuition Program or, at the option of the settlement class member, (ii) to the extent permitted by the Florida Prepaid Tuition Program, obtain those persons' reinstatement in that Program.

Facts Relating to the Fairness of the Settlement

25. The settlement offers full restitution to settlement class members. The settlement is at the top of the range of possible compensatory damages. It is not discounted to reflect the risks, delays or costs of litigation.

26. The following are issues that could present obstacles to plaintiffs' success at trial (which obstacles might or might not be overcome) if this matter were to proceed in litigation:

- establishing the elements necessary to obtain class certification, if this case were litigated rather than settled;

- proving that any settlement class member was unaware that he or she had purchased life insurance in view of written disclosures made to and acknowledgements signed by settlement class members;
- overcoming the defense that their RICO claims are precluded by the McCarran-Ferguson Act;
- overcoming the defense that their Florida Civil Remedies for Criminal Practices Act claims are precluded by the Florida Unfair Insurance Trade Practices Act;
- establishing the necessary elements of their RICO, Florida Civil Remedies for Criminal Practices Act and common law claims; and
- establishing that settlement class members' claims are timely under applicable statutes of limitations.

27. This action, if litigated, would be complex, expensive and time-consuming.

28. Negotiations leading to the settlement lasted several months and, at times, were acrimonious. (*See* Affidavit of Lorna G. Schofield, sworn to June 27, 1994, Docket No. 117; Affidavits of Ron Parry, sworn to April 19, 1994, Docket No. 45, and June 28, 1994, Docket No. 109, Ex. C; Affidavit of Judy S. Hoyer, sworn to April 7, 1994, Docket No. 109, Ex. D.) There is no evidence of collusion.

29. More than 40 state insurance regulators have approved the substance of the proposed settlement, including the settlement amount and the methods for identifying those persons who received individual notice. (Neiditch Aff. ¶¶ 2, 8-9.)

CONCLUSIONS OF LAW

Subject Matter Jurisdiction

30. The Court has jurisdiction over the federal claims under 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331.

31. The Court has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

32. In arguing the weaknesses in plaintiffs' case, MetLife has asserted that the McCarran-Ferguson Act precludes plaintiffs' RICO claims. Plaintiffs have disputed this issue. In either event, the Court has subject matter jurisdiction. Even if MetLife is correct, the Court has subject matter jurisdiction because the federal claims alleged in this Complaint are not devoid of merit on their face. *See Nelson v. Greater Gadsden Housing Auth.*, 802 F.2d 405, 408 (11th Cir. 1986). Moreover, successfully asserting the McCarran-Ferguson Act as an affirmative defense would result in the dismissal of plaintiffs' RICO claims *on the merits* for failure to state a claim, and not for lack of subject-matter jurisdiction. *Dexter v. Equitable Life Assurance Soc'y*, 527 F.2d 233, 236-37 (2d Cir. 1975).

33. The Court also has determined to exercise its supplemental jurisdiction over state law claims in this case in the interests of judicial economy, convenience, and fairness to litigants, particularly the more than 20,000 who have filed Proof of Claim forms and indicated their desire to accept the restitution set forth in the Settlement Agreement.

Class Certification

34. The certified settlement class is sufficient under Fed. R. Civ. P. 23 for settlement purposes. The standards of Rule 23 for class certification are more easily met in the context of settlement than in the context of contested litigation. *White v. National Football League*, 822 F. Supp. 1389, 1402 (D. Minn. 1993); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 157-158 (S.D. Ohio 1992); *Dalkon Shield Claimants' Comm. v. Aetna Cas. & Sur. Co. (In re A.H.*

Robins Co.), 85 B.R. 373, 378 (E.D. Va. 1988), *aff'd*, 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Adequacy of Notice

35. Elements of Rule 23(c)(2) notice (for class certification) are combined with elements of Rule 23(e) notice (for notice of settlement or dismissal) where, as here, the parties have sought simultaneously to certify a settlement class and settle a class action. *Hitt v. Nissan Motor Co. (In re Nissan Motor Corp. Antitrust Litig.)*, 552 F.2d 1088 (5th Cir. 1977).

36. The notices to potential class members provided all the information material to making an informed and intelligent decision whether to participate in the settlement class and the settlement. *See id.* at 1105. This notice fairly and reasonably advised potential class members of their rights under the settlement, and constituted due and sufficient notice for all other purposes to persons entitled to receive notice required by due process and Rule 23.

37. The methodology used to identify potential class members to receive individual notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Rule 23 does not require actual notice to each and every possible class member where, as here, a precise list of actual settlement class members could not be created. *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988); *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985). Supplementing individual notice with publication notice represents an appropriate balance between protecting class members and making Rule 23 workable. *See Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988); *In re Agent Orange*, 818 F.2d at 168-69; *Manual for Complex Litigation, Second* § 30.21 at 223 (1986). The Court concludes that the individual notice and publication notice collectively constituted the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement and settlement hearing, and thereby satisfied the requirements of Rule 23(c)(2) (as well as Rule 23(e)).

Objections

38. Two settlement class members filed timely objections to the settlement with the Court. They asserted, respectively, that (a) the settlement should provide for punitive damages, and (b) the annuity is insufficient settlement relief. These objections were considered and are rejected because the settlement provides 100% of compensatory damages, and punitive and treble damages are not to be considered in determining the upper range of possible recovery for settlement purposes. *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 319 n.25 (N.D. Ga. 1993); *Namoff v. Merrill Lynch, Pierce, Fenner & Smith (In re Dennis Greenman Sec. Litig.)*, 622 F. Supp. 1430, 1441 (S.D. Fla. 1985), *rev'd on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

39. The objections raised by the Coulters, although not timely filed, were considered and rejected. The Coulters' objection merely refers back to their motion to intervene and supporting arguments, which were briefed, argued and rejected. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

40. The Court considered the objections raised by the former sales managers and Daxon, even though they are not class members and lack standing to raise the objections. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.) Certain of those objections are antithetical to the interests of the settlement class and are rejected.

41. The remaining objections of the former sales managers and Daxon are as follows:

(a) They objected that the notice does not adequately warn class members of the risks of surrendering their whole life insurance policies and claiming a full refund. This objection is rejected. The notice clearly presented the settlement options and warned policyholders to consider carefully whether cancellation of their life insurance was in their best interests. Such notice is legally sufficient.

Grunin v. International House of Pancakes, 513 F.2d 114, 122 (8th Cir. 1974) (fact that notices do not fully explore options is immaterial because class members "are not expected to rely upon the notices as a complete source of settlement information"), *cert. denied*, 423 U.S. 864 (1975); *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1522 (N.D. Ala. 1991) (denying movants' claim that settlement notice was misleading and/or incomplete because it allegedly did not explain effect of settlement provisions on policyholders), *aff'd*, 974 F.2d 1279 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2999 (1993). The Court concludes that additional information about settlement options would have made the notice lengthy, confusing and would have been inappropriate, particularly in light of the nature of the allegations asserted in this action. *See In re Farmers Group Stock Options Litig.*, [1991-1992] Fed. Sec. L. Rep. (CCH) ¶ 96,522, at 92,378 (E.D. Pa. Dec. 19, 1991) (settlement notice must "be neutral in its description of class member options"; fuller details of settlement options would have "counterproductively engendered confusion" given the speculative nature of information, especially where class members presumably could consult with their own brokers if they had questions regarding settlement).

(b) The former sales managers and Daxon objected that the release as set forth in the proof of claim is overly broad in that it could cover derivative claims. This objection is rejected. Derivative claims belong to and are brought on behalf of the corporation, and not any individual. *See, e.g.*, Fed. R. Civ. P. 23.1. Derivative claims on behalf of the company relating to the sales solicitations at issue have already been asserted. (*See, e.g.*, Derivative Complaint, Ex. B to the former sales managers' Objection, Docket No. 35.) If those claims result in a recovery in favor of the company, those funds will be paid to the company and not to any individual. *See, e.g., In re General Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1087 (6th Cir.) ("Any relief obtained [in a derivative action] belongs to the corporation only"), *cert. denied*, 469 U.S. 858 (1984); *Recchion ex rel. Westinghouse Elec. Corp. v. Kirby*, 637 F. Supp. 1309, 1315 n.1 (W.D. Pa. 1986) ("Any recovery in a derivative action belongs to the corporation," citing *Ross v. Bernhard*, 396 U.S. 531, 538 (1970)).

(c) The former sales managers and Daxon objected that the settlement class includes either too many or too few potential claimants. This objection is rejected. No precise list of settlement class members can be compiled because the parties cannot determine which policyholders received (and relied on) allegedly misleading sales solicitations. (Amodeo Aff. ¶ 5.) Individual notice was provided to an overly broad group of potential settlement class members and was supplemented by broad publication notice. As stated above, the Court has concluded that this notice was "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). Notice to a greatly overinclusive group of all MetLife whole life policyholders is unwarranted and impractical because the vast majority of those persons probably knew they were buying life insurance and were not misled by allegedly improper sales solicitations. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 169 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988) (court did not require individual notice to every Vietnam veteran in order to reach a class consisting of such veterans who had been exposed to Agent Orange).

(d) The former sales managers and Daxon objected that the settlement is collusive. This objection is rejected as baseless. No evidence of collusion exists.

(e) The former sales managers objected that the class definition is inconsistent with the Proof of Claim form in that the latter includes a requirement that a class member certify that he or she had been misled, even though the class definition does not do so. This objection is rejected because the settlement class is properly defined in objective terms. Class membership should not depend on a determination of the merits of each potential class member's claims. *Manual for Complex Litigation, Second* § 30.14 (1986). Moreover, the settlement class was certified for the sole purpose of resolving the claims asserted in the Complaint, which in substance allege that policyholders were misled in the purchase of their whole life insurance policies. Thus, class members who sought to make a claim were appropriately required to assert that they were misled in the

purchase of their policy and did not understand that they were buying a life insurance policy at the time they purchased it in order to participate in the settlement.

42. Urso asserted substantially the same objection concerning the certification required in the Proof of Claim form. The Court has considered and rejects the objection for the reasons stated above, even though Urso is not a settlement class member and therefore lacks standing to raise the objection. (*See* Order on Motions to Intervene and to Dismiss Notices of Intention to Appear and Object of Certain Purported Class Members, Docket No. 219.)

Fairness of Settlement

43. There are six factors to consider in determining whether a class action settlement is fair and adequate. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Cotton v. Hinton*, 559 F.2d 1326, 1330-31 (5th Cir. 1977). These factors support approval of the settlement in this case.

44. (First factor:) The risk that plaintiffs would lose on the merits at trial supports approval of the settlement. *See Bennett*, 737 F.2d at 986.

45. (Second and third factors:) The amount of the settlement, which here is at the upper end of the range of possible recovery, supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977).

46. (Fourth factor:) The prospect of complicated, expensive and time-consuming litigation if the case were not settled supports approval of the settlement. *Bennett*, 737 F.2d at 986; *Warren v. City of Tampa*, 693 F. Supp. 1051, 1059 (M.D. Fla. 1988), *aff'd*, 893 F.2d 347 (11th Cir. 1989).

47. (Fifth factor:) The virtual lack of objections from settlement class members, and the lack of substance of objections that were made, support approval of the settlement. *Bennett*, 737 F.2d at 986, 988 & n.10; *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180

(5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981); *Meyer v. Citizens & Southern Nat'l Bank*, 677 F. Supp. 1196, 1212 (M.D. Ga. 1988).

48. (Sixth factor:) The stage of the proceedings at which the settlement was achieved, prior to formal discovery, does not weigh against approval of the settlement. *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litig.)*, 643 F.2d 195, 211 (5th Cir. April 1981); *Cotton*, 559 F.2d at 1332. Here the settlement was not discounted to reflect the risk of loss, and class counsel had access to a great deal of other information, obtained from such sources as extensive press reports, their own clients, and the report of Thomas Tew on behalf of the Florida Commissioner of Insurance. (*See generally* Parry Aff. ¶ 12, Docket No. 109.)

49. The absence of evidence that the settlement is the product of anything other than arm's-length, non-collusive negotiations supports approval of the settlement. *Cotton*, 559 F.2d at 1330; *Behrens v. Wometco Enters.*, 118 F.R.D. 534, 538 (S.D. Fla. 1988), *aff'd*, 899 F.2d 21 (11th Cir. 1990); *Warren*, 693 F. Supp. at 1055.

50. The Court has given weight to the views of counsel who negotiated the settlement as to the merits of the settlement. *See Cotton*, 559 F.2d at 1330; *Ressler v. Jacobson*, 822 F. Supp. 1551, 1552 (M.D. Fla. 1992). The Court has also considered the views of experts who have examined the settlement and found it to be fair and adequate.

51. In addition, the Court has considered and accorded great weight to the approval given to the restitution plan embodied in the settlement by more than 40 independent state insurance regulators around the country as evidence that the settlement is fair and was the product of arm's-length, non-collusive negotiations. *See Marshall*, 550 F.2d at 1178; *Scholes v. Stone, McGuire & Benjamin*, 839 F. Supp. 1314, 1318 (N.D. Ill. 1993).

52. The settlement is fair, adequate and reasonable and not the product of collusion between the parties.

In Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER APPROVING
CLASS ACTION SETTLEMENT

Before the Court is a joint motion (Docket No. 35) by the named plaintiffs and the defendant, Metropolitan Life Insurance Company ("MetLife") for approval of a proposed settlement pertaining to a settlement class consisting of:

> all persons who purchased a MetLife whole life insurance policy as a retirement and/or other savings plan or vehicle, based in whole or in part on written materials or other solicitations that allegedly did not fully disclose that these plans were life insurance products, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of MetLife between January 1, 1990 and October 31, 1993,

which was certified by Order of this Court dated April 22, 1994, under Rule 23(b)(3), Fed. R. Civ. P., solely for the purpose of settlement. The joint motion for approval of the settlement was fully briefed, supported by affidavits, testimony and documents in the record, and was the subject of a full-day hearing on July 18, 1994.

Based on these submissions, and the Court's Findings of Fact and Conclusions of Law Regarding Fairness of Class Action Settlement rendered herewith,

IT IS HEREBY ORDERED that:

1. The settlement as evidenced by the parties' Settlement Agreement, dated April 4, 1994, is hereby determined to be fair, reasonable and adequate, and the parties are directed to comply with and consummate its terms.

2. Notice of the settlement to potential settlement class members, given in the form and manner provided in this Court's Order of April 22, 1994 (Docket No. 48), is hereby determined to have constituted the most effective and practicable notice under the circumstances of the pendency of the class action, proposed settlement and settlement hearing. This notice fairly and reasonably advised potential class members of their rights under the settlement and constituted due and sufficient notice for all other purposes to persons entitled to receive notice required by due process and Rule 23 of the Federal Rules of Civil Procedure.

3. The Proof of Claim form previously approved by the Court fairly and reasonably advised potential class members of their options if they wished to participate in the settlement and in a manner that neither encouraged nor discouraged potential class members from electing any particular settlement alternative. In addition, the Proof of Claim form fairly and effectively solicited information needed to determine whether persons submitting the form were eligible for settlement class relief.

4. The Settlement Agreement is and shall be binding on all settlement class members.

5. MetLife, its past, present and future officers, directors, employees, agents, representatives, and its predecessors, successors, parents, subsidiaries, partners, corporate affiliates, successors in interest and assigns, together with the respective past, present and future officers, directors, employees, agents and representatives of any or all of them ("MetLife and its Affiliates"), are forever

discharged from any and all causes of action, claims, damages, equitable and legal relief, demands or rights that *(i)* have been or could have been asserted by Sherry Horton, Joyce Armbruster or Deborah K. Spamer (the "Named Plaintiffs"), other settlement class members or the settlement class in this action or *(ii)* have been, could have been, may be or could be alleged or asserted by any of the Named Plaintiffs, other settlement class members or the settlement class against MetLife and its Affiliates, or any of them, now or hereafter, on the basis of, connected with, arising out of, or related in whole or in part to any or all of the acts, omissions, facts, matters, transactions or occurrences that were directly or indirectly alleged, asserted, described, set forth or referred to in this action or that are related to sales solicitations described in the Second Amended Complaint ("Sales Solicitations") or the purchase of Whole Life Policies (defined as policies designated by MetLife as Whole Life, Life Paid Up at 95 or Life Paid Up at 98), including without limitation any and all claims for damages, rescission, equitable and legal relief, attorneys' fees, costs or disbursements incurred by any person or entity in connection with or related in any manner to this action, the settlement thereof, the administration of this settlement, the Sales Solicitations or the purchase of Whole Life Policies, *provided, however*, that nothing herein is intended to bar any action to enforce the Settlement Agreement in accordance with its terms.

6. All claims of plaintiffs and settlement class members in this action are dismissed on the merits and with prejudice, without costs to any party except as provided in the Settlement Agreement.

7. The Court expressly retains jurisdiction over the administration of the settlement for the purposes of (*i*) supervising the Restitution, as defined in the Settlement Agreement and as stipulated by MetLife at the July 18, 1994 hearing with respect to Settlement Class Members who withdrew from the Florida Prepaid Tuition Program; (*ii*) ruling upon any application by settlement class counsel for an award of attorneys' fees; (*iii*) otherwise enforcing the terms and conditions of the Settlement Agreement and resolving any disputes, claims or causes of action that, in whole or in part, are related to or arise out of the Settlement Agreement, Final Judgment or this Order;

(*iv*) entering such additional orders as may be appropriate or necessary to protect or effectuate the Court's Order and Final Judgment approving the terms of the Settlement Agreement and dismissing claims thereunder, and to ensure the fair and orderly administration of this settlement; and (*v*) any other appropriate or necessary purpose, and the Court reserves the power to protect and effectuate this Order and Final Judgment and to enter such orders as may be necessary in aid of its continuing jurisdiction.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

FINAL JUDGMENT

WHEREAS plaintiffs and defendant entered into an agreement for the settlement of this class action, dated April 4, 1994; and

WHEREAS the Court granted certification of a settlement class, and ordered individual and publication notice to potential class members that provided such potential class members an opportunity to exclude themselves from or object to the settlement, on April 22, 1994; and

WHEREAS the parties have jointly moved for final approval of the settlement and for dismissal of the action; and

WHEREAS the parties' motion was briefed fully, supported by affidavits, testimony and documents, and was the subject of a full day hearing before this Court on July 18, 1994, at which settlement class members and others were afforded an opportunity to object to the settlement; and

WHEREAS the Court has found the settlement to be a fair resolution of this class action, has entered findings of fact and conclusions of law to that effect, and has entered an order approving

the settlement and dismissing the settlement class members' claims; therefore,

IT IS HEREBY ADJUDGED AND DECREED THAT:

1. The settlement of this class action on the terms set forth in the parties' Settlement Agreement is approved, for the reasons set forth in this Court's Order Approving Class Action Settlement, dated 10/25/94, and its Findings of Fact and Conclusions of Law, dated 10/25/94.

2. The claims in this action are dismissed on the merits and with prejudice on the terms set forth in the parties' Settlement Agreement, without costs to any party except as provided therein.

3. The Court will retain jurisdiction over this action for the purposes set forth in this Court's Order Approving Class Action Settlement, dated 10/25/94.

4. There being no just reason for delay, this document shall constitute the final judgment on these claims for the purposes of Fed. R. Civ. P. 54(b).

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER

The following class members filed requests for enlargement of time within which to seek exclusion from the class ("requests"): John Romano (Doc. 119B), Terrance J. McDonnell (Doc. 119C), Joann Kablach (Doc. 119D), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), Deborah R. Myers (Doc. Doc. 159), Darrin L. Johns (Doc. 160), Anissa and Ronald Coulter (Doc. 174), Jeanne Yokel (Doc. 175), Eric Maharg (Doc. 176), and Albert Darren Wise (Doc. 177) (collectively, the "applicants").

Each of the requests were filed by attorney Kenneth Behrend. The applicants seek to exclude themselves from the class even though they failed to comply with the provisions of the settlement agreement (Doc. 35) and applicable order (Doc. 48). Both the agreement and order require that class members electing exclusion send to the Claims Administrator a "request for exclusion" postmarked on or before June 13, 1994.

None of the applicants questions the need for a deadline or the appropriateness of the June 13, 1994, deadline. The applicants

suggest simply that they should be provided additional time to exclude themselves because they have shown "excusable neglect" under Rule 6(b)(2), Federal Rules of Civil Procedure. The excusable neglect standard applies to the requests because they were filed after the expiration of time for seeking exclusion.

The determination of whether the time for exclusion should be enlarged is left to the district court's sound discretion. *See*, *e.g.*, *Davidson v. Keenan*, 740 F.2d 129 (2d Cir. 1984). "To sustain a finding of excusable neglect, the party seeking the enlargement of time bears the burden of proving both *good faith* and a *reasonable basis* for not complying within the specified period." *Breslow v. Prudential-Bache Props., Inc.*, 1994 WL 478611, *3 (N.D. Ill. Sept. 1, 1994) (emphasis added). The class action deadline serves an important function and should not be disturbed casually. *Id.* For the following reasons, the applicants' requests are **DENIED**.[1]

Before addressing the individual requests, considering the prejudice, if any, the respective parties may suffer by denying the requested relief is worthwhile. In its response (Doc. 190), Metlife offers the applicants the same settlement options that were available initially to them even though the time for submitting a completed

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1. This ruling is based on the merits. In its response (Doc. 190), Metlife seeks denial of the requests based, in part, on procedural grounds. Metlife asserts that the "requests" are fatally defective because they are not styled as "motions." Without citing to any case authority, Metlife suggests that, to give effect to the difference between Rule 6(b)(1), which allows an enlargement of time based simply on a request, and Rule 6(b)(2), which requires a motion, the applicants' papers must be styled as motions. Here, the difference is inconsequential. The parties have been provided an opportunity to respond to the requests regardless of how they are designated. Accordingly, Metlife's procedural argument is unavailing. For purposes of this order, the applicants' requests are construed as motions and denied on the merits. A procedural basis for denying the requests is the applicants' failure to comply with Local Rule 3.01(g). However, in light of Metlife's response (Doc. 190), requiring the parties to confer in good faith appears futile. For this reason, the requests are considered despite the applicants' non-compliance with the Local Rules.

proof of claim form has passed.[2] In a separate order, the terms of the settlement agreement, including the cash refund and annuity options, are held fair, reasonable, adequate, and in the best interest of the class members. Therefore, precluding the applicants from opting out of the class at this time will cause them no cognizable prejudice. In fact, many of the applicants request a cash refund as alternative relief.

On the other hand, allowing class exclusions at this late stage will cause severe prejudice to Metlife. The settlement agreement reflects the parties bargained-for expectations. The opt-out deadline is a material provision of the settlement agreement. That deadline provided Metlife with an opportunity to determine the potential number of claims that may remain unresolved and to evaluate the objections to the proposed settlement. Prior to the fairness hearing, Metlife had the ability to assess that information and, pursuant to the terms of the settlement agreement, to terminate the proposed settlement. Metlife no longer has the right to consider the applicants' claims and decide whether to terminate the agreement.

From Metlife's perspective, a bargained-for purpose of the $76 million agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Allowing untimely exclusions without sufficient cause and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

The first group of applicants to be considered are those class members who allege that they failed to submit their requests for exclusion on or before June 13, 1994, because the proof of claim form is allegedly confusing. Their argument is without merit. The class notice, which accompanied the claim form and was approved by this Court, states clearly that a class member, to be excluded from the class, must submit to the Claims Administrator a request for exclusion

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2. Metlife is now bound to offer the applicants the option of either the cash refund or the annuity. Upon entry of this order, the applicants may contact counsel for Metlife to discuss submitting a completed claim form and electing one of the options.

postmarked on or before June 13, 1994. The claim form, which is equally clear, addresses the procedure for electing the cash refund and annuity options, and not the procedure for opting-out.

As a matter of law, misunderstanding the language of a court-approved class notice and claim form fails to constitute excusable neglect for purposes of Rule 6(b)(2). *See In re VMS Secs. Litig.*, 1992 WL 203832, *3-4 (N.D. Ill. Aug. 13, 1992). If class members needed additional information, they could have contacted class counsel or the Claims Administrator. The class notice specifically informed the class members that those resources were available for free. Alternatively, class members who were unable to understand the class notice or claim form could have consulted with their attorney. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51-2 (7th Cir. 1994).

Accordingly, the requests for enlargement filed by class members Terrance J. McDonnell (Doc. 119C), Myrna Lesueur (Doc. 119E), Brian T. Rohm (Doc. 119F), Douglas and Roena Conner (Doc. 119G), Marjorie Palmer (Doc. 119H), Terry A. Palmer (Doc. 199I), and Albert Darren Wise (Doc. 177) fail to establish excusable neglect and are denied. Except for Wise, each of these applicants requests the cash refund as alternative relief. Inasmuch as Metlife must offer either the cash refund or the annuity, the applicants will be receiving, in part, their requested relief.

Class members Deborah R. Myers and Darrin L. Johns filed their requests for enlargement (Docs. 159 and 160, respectively) on August 8, 1994. In their requests, both Myers and Johns assert that they met with their attorney, Kenneth Behrend, well before the June 13, 1994, deadline and expressed to him their desire to be excluded from the class. Due to some undefined "clerical error," their attorney did not submit requests for exclusion to the Claims Administrator.

The requests for enlargement filed by Myers and Johns fail to establish excusable neglect. Their assertions are not supported by an affidavit or some other admissible evidence. Additionally, assuming the assertions are true, inadvertence of counsel generally fails to constitute excusable neglect. *See, e.g., Davidson v. Keenan*,

740 F.2d 129, 132 (2d Cir. 1984); *Jones v. Siegfried Constr. Co., Inc.*, 105 F.R.D. 491, 492 (W.D.N.Y. 1984), *aff'd*, 792 F.2d 136 (2d Cir.), *cert. den. sub nom. Jones v. Niagara Frontier Transp. Auth.*, 479 U.S. 932, 107 S. Ct. 404 (1986). Myers and John explain neither the alleged "clerical error" nor the eight-week period that lapsed before attempting to correct the error. Accordingly, the requests for enlargement filed by Myers (Doc. 159) and Johns (Doc. 160) are denied.

Joann Kablach's request (Doc. 119D) fails to show excusable neglect. Kablach avers that she was unable to submit a timely request for exclusion because she did not receive a class notice and claim form packet until June 17, 1994. However, Kablach fails to mention that she did not request a packet until June 16, 1994. *See* ¶ 6(c) of Goldsmith Affidavit (Doc. 191). Conspicuously missing from Kablach's request is the date she met with her attorney and learned about the June 13, 1994, deadline. For these reasons, Kablach's request (Doc. 119D) is denied.

In his unverified request (Doc. 176), Eric Maharg states that he failed to submit a timely request for exclusion because he reasonably relied (1) on a form letter and pamphlet that he received from his Metlife sales agent and (2) on alleged representations made by his Metlife sales agent in relation to the pamphlet.

The form letter, dated March 31, 1994, discussed simply the availability of "up-to-date" information regarding Maharg's policy (*e.g.*, current cash value). The pamphlet prepared my Metlife advises policyholders that the controversy over sales practices would not affect the financial security of the company's products. The pamphlet also discusses Metlife's response to investigations by state regulators and the company's financial strength. The purported representation made by Metlife's sales agent allegedly includes assurances that Maharg's policy is unrelated to the policies sold in Florida and suggests that he refrain from taking action in the Florida proceeding.

Maharg's claim of reasonable reliance is without merit.[3] Reliance on a defendant's account agent (for purposes pertinent to this case) is unreasonable and fails to constitute excusable neglect. *See In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 52 (7th Cir. 1994). Moreover, neither the March 31 letter, the accompanying pamphlet, nor the ensuing conversation with the Metlife sales agent could have possibly suggested to Maharg that he ignore the June 13, 1994, deadline to exclude himself from the class. The parties did not enter the settlement agreement until April 6, 1994. More important, the settlement class was not certified and the June 13, 1994, deadline was not established until April 22, 1994. Further, nothing in the March 31 letter or pamphlet even remotely suggests that Maharg refrain from excluding himself from this class action lawsuit.

Assuming that the Metlife sales agent suggested to Maharg that he refrain from participating in the Florida proceedings described in the pamphlet, that suggestion is of no consequence. The proceedings described in the pamphlet are a regulatory investigation conducted by the Florida Insurance Department, an in-house investigation conducted by Metlife, internal changes made by Metlife as a result of its in-house investigation, and a program implemented voluntarily by Metlife to provide restitution to policyholders who purchased whole life insurance from the Tampa office. Maharg could not have participated in these proceedings. The Metlife sales agent has no recollection of telling Maharg or any other policyholder that they should refrain from participating in this class action lawsuit. *See* Affidavit of Mathew A. Badger (Doc. 203).

Finally, Maharg purportedly learned about the June 13, 1994, deadline in August when he consulted with attorney Kenneth Behrend. If Maharg could consult with an attorney in August, he could have consulted with an attorney before the June 13 deadline. Maharg should have consulted a competent, independent professional with his

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3. Because Maharg fails to show reasonable reliance, the remaining two elements of equitable estoppel (*i.e.*, misrepresentation, detrimental reliance) need not be considered.

legal questions. He should not have relied (assuming he did) on his Metlife sales agent, the person with whom he allegedly had a dispute.

Maharg has not and cannot assert that he was unaware of this class action and the settlement options. The Claims Administrator sent Maharg a class notice. *See* Affidavit of G. Peter Buchband (Doc. 202); Affidavit of Lawrence A. Vranka (Doc. 201). Whether Maharg actually received the notice is irrelevant so long as Metlife complied with the court-approved notice procedures. *See In re VMS Secs. Litig.*, 1994 WL 386397, *3 (N.D. Ill. July 20, 1994). Even if Maharg's unsworn statement that he never received the class notice is true, he was on constructive notice of the pending class action and proposed settlement pursuant to the published notice contained in newspapers circulated throughout Pennsylvania. For these reasons, Eric Maharg's request for enlargement of time within which to exclude himself from the class (Doc. 174) is denied.

John Romano's request (Doc. 119B) is denied as well. Romano states that his attorney, Kenneth Behrend, posted his request for exclusion on June 13, 1994, but that it was not postmarked until June 14, 1994. However, according to a sworn admission made on Romano's behalf, this statement is untrue. On June 13, 1994, Mr. Behrend attempted to exclude Mary Romano and not John Romano. *See* Affidavit of Lorrie Wesolosky (Doc. 119A). The Claims Administrator never received a request for exclusion from John Romano. The Claims Administrator did receive from Mary Romano a request postmarked on June 14, 1994. *See* ¶ 4(b) of Affidavit of Linda Goldsmith (Doc. 191). Accordingly, because John Romano never submitted a request for exclusion as he suggests, his request for enlargement (Doc. 119B) is denied. Mary Romano, who made an unsuccessful attempt to exclude herself, has not sought any relief.

Anissa and Ronald Coulter request an enlargement of time within which to exclude themselves from the class (Doc. 174). On March 24, 1994, the Coulters filed in Pennsylvania their own lawsuit against Metlife. The Coulters do not suggest excusable neglect as a basis for seeking permission to submit an untimely exclusion. Instead, they argue that they should be excluded from the class because they

manifested their intent to be excluded when they (1) filed their Pennsylvania action on March 24, 1994, and (2) filed their motion for intervention (Doc. 77) in this action on May 23, 1994. To the extent that the Coulters suggest excusable neglect, they assert that they should be relieved from the June 13, 1994, deadline because they never received a class notice.

As Metlife states in its response, "Of all the positions taken by the various applicants, the least explicable is that of Ronald and Anissa Coulter." *See* p. 14 of Metlife response (Doc. 206). In their motion for intervention (Doc. 77), the Coulters sought to exclude all Pennsylvania residents from this action or to have their attorney appointed as counsel for the Pennsylvania members of the settlement class. As class members, the Coulters also filed a notice of intention to appear and objections to the proposed settlement (Doc. 119).

"The pendency of an individual action does not excuse a class member from filing a valid request for exclusion." *In re VMS Secs. Litig.*, 1992 WL 203832, *3 (N.D. Ill. August 13, 1992). Apparently, the Coulters made a tactical decision to avoid exclusion for the purpose of objecting to the settlement and seeking significant relief (*i.e.*, exclusion of all Pennsylvania residents or appointment of their attorney as class counsel).[4] However, they cannot have it both ways. The Coulters had a choice to opt out or participate. They chose to participate. The parties were forced to respond to the numerous papers that the Coulters filed in this action. A tactical decision in litigation does not constitute excusable neglect. *See Slaughter v. Southern Talc Co.*, 919 F.2d 304, 307 (5th Cir. 1990). The Coulters will not be relieved from the consequence of their failed plan. They received the benefits of retaining their class membership (*i.e.*, objecting to the settlement and participating in the fairness hearing) and must now accept the settlement. *See, e.g., In re VMS Ltd. Partnership Secs. Litig.*, 26 F.3d 50, 51 (7th Cir. 1994).

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4. Unlike some of the other applicants, the Coulters do not deny the tactical nature of their decision. For example, in Maharg's request (Doc. 176), he states, "The decision to request exclusion at this time was not made in bad faith, i.e., to obtain any tactical advantage in the class action proceedings."

The Coulters' assertion that they should be relieved from the June 13, 1994, deadline because they did not receive the notice is baseless. The Claims Administrator mailed a class notice to Ronald Coulter on May 2, 1994. *See* Affidavit of G. Peter Buchband (Doc. 202). Moreover, based on the Coulters' papers, they knew about the proposed settlement and became intimately familiar with its terms as early as May 5, 1994. *See* ¶ 16 of the Coulters' motion to intervene (Doc. 77). Because the Coulters knew about the June 13, 1994, deadline and had the ability to exclude themselves, their request (Doc. 174) is denied.

Finally, Jeanne Yokel requests an enlargement (Doc. 175) because she was allegedly unsure as to whether she is a member of the class. In her unverified request, Yokel asserts that the confusion was caused by her receiving a class notice even though she purchased an odd premium/even face value whole life insurance policy. Yokel's attorney qualifies her claim as "churning" and unrelated to the claims involved in this action.

Whether Yokel's policy is odd premium/even face value or even premium/odd face value is of little relevance in determining whether she is a class member. That information was relevant to identifying potential class members and determining whether a policyholder should have received a class notice. Thus, Yokel had no legitimate basis for being confused.

If Yokel was in doubt about her status, she should have erred on the safe side and protected her interests by submitting a timely request for exclusion.[5] The second sentence of the class notice states, "The purpose of this Notice is to advise you concerning three

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5. Alternatively, prior to the June 13, 1994, deadline, Yokel could have sought a declaration that she is not a class member. At that time, she could have obtained attorney Behrend's assistance with the class notice and determined whether declaratory relief was necessary. If Yokel sought his advise in August, she could have done so in June, before the relevant deadline. ***See In re VMS Partnership Secs. Litig.***, 26 F.3d 50, 51-2 (7th Cir. 1994). As mentioned earlier, the class notice that Yokel received informed her that she could not only seek assistance from her own attorney, but could contact class counsel or the Claims Administrator for additional information.

decisions you *must* make." (emphasis added). The class notice clearly informed Yokel that by failing to exclude herself she would be relinquishing her rights to file an individual lawsuit against Metlife and that she would be bound the adjudications in this action. Because Yokel has not shown excusable neglect for her failure to submit a timely request for exclusion, her request for enlargement (Doc. 175) is denied.

Although each of the applicants' requests is denied, any applicants wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed proof of claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SHERRY HORTON, et al.,

Plaintiffs,

vs. CIV. NO. 93-1849-CIV-T-23A

METROPOLITAN LIFE
INSURANCE COMPANY,

Defendant.

ORDER

Before the Court is a petition (Doc. 178) filed on September 21, 1994, by 26 individuals (the "petitioners") seeking a declaration that they are not members of the class. In the petition, these alleged policyholders assert that they "were aware that life insurance was part of the purchase they made from Metlife." Because they did not receive a class notice, the petitioners claim to be uncertain as to whether they are considered class members. Apparently, the petitioners wish to pursue individual claims against Metlife.[1]

However, the petitioners fail to provide any affidavits or other admissible evidence verifying their assertions. Further, even if they purchased their life insurance policies during the relevant period, the petitioners' allegations are insufficient to find that they are beyond the scope of the class definition. The settlement class consists of:

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1. The petitioners appear to be trying to do indirectly what they are unable to do directly. The deadline for opting out of the class has passed. Absent sufficient cause, all persons who qualify as class members are bound by the terms of the settlement agreement and this Court's orders.

> all persons who purchased a Metlife whole life insurance policy as a retirement and/or other savings plan or vehicle, *based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products*, from (a) the Rick Urso & Associates sales office (or its predecessor office) between January 1, 1988 and October 31, 1993, or (b) any other sales office of Metlife between January 1, 1990 and October 31, 1993.

See April 22, 1994, order (Doc. 48). Awareness that the product included life insurance fails to equate with making the purchase "based in whole or in part on written materials that allegedly did not fully disclose that these plans were life insurance products."

The Court is unwilling (1) to declare that a group of 25 individuals is not a part of the class or otherwise (2) to unravel in a piecemeal fashion and without sufficient cause the court-approved settlement. As mentioned in a separate order, one of the bargained-for purposes of the $76 million settlement agreement is to litigate the asserted claims in one forum and to bring finality to those claims. Granting the petitioners' request without a sufficient basis and forcing Metlife to litigate elsewhere would not only frustrate the purposes of the court-approved settlement and undermine the Court's orders but would be fundamentally unfair to Metlife, which is attempting to resolve all pending claims.

Accordingly, the petition (Doc. 178) is **DISMISSED WITHOUT PREJUDICE**. As Metlife suggests in its response (Doc. 190), whether a policyholder is a class member is a fact-specific inquiry that must be accomplished on a case-by-case basis. Among the pertinent factual questions may be the date on which the policyholder learned of this action and the pending settlement agreement. Thus, any petitioner wishing to obtain a declaration of their status in relation to this class action shall file on or before November 17, 1994, an individual petition making the requisite allegations supported by affidavits or other admissible evidence.

Pursuant to Rule 53, Federal Rules of Civil Procedure, and consistent with the terms of the settlement agreement (Doc. 35) and

the applicable order (Doc. 48), Peter Grilli is appointed as a special master. Because of the large volume of petitions that may be filed, exceptional conditions require this appointment. Any petitions or other requests seeking either a declaration that an individual is not a member of the class or some similar relief are **REFERRED** to the special master to conduct any proceedings, including evidentiary hearings, to prepare reports and recommendations. Each report and recommendation shall contain findings of fact and conclusions of law. Mr. Grilli shall be compensated for his time at $150 per hour and reimbursed for all out-of-pocket expenses in connection with the performance of his duties. Unless otherwise agreed to by the parties, the fees and costs associated with each petition shall be shared equally between the petitioner and Metlife. Mr. Grilli shall be paid the fees and costs immediately upon his submission to the Court of the report and recommendation.

In light of the allegations in the petitions, the possibility exists that some, and possibly all, of the petitioners may qualify as class members. As class members, prior to June 30, 1994, they could have elected the options contained in the settlement agreement (*i.e.*, annuity or cash refund). In its response (Doc. 190), Metlife offers the petitioners the same settlement options that were available initially to them even though the time for submitting a completed proof of claim form has passed. Metlife is now bound to honor that offer. Any petitioner wishing to elect the cash refund or annuity options shall do so by submitting to the Claims Administrator a properly completed claim form. The form shall be *received* by the Claims Administrator on or before November 10, 1994.

ORDERED in Tampa, Florida, on October 25th, 1994.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 15 1997
CLERK

No. 96-1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al
AND THOMAS ROSTEK, et al

Plaintiffs-Petitioners,

IN RE APPEAL OF DOUGLAS SMITH,

Plaintiff-Petitioners,

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,

Plaintiffs-Petitioners,

--v.--

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

IN RE APPEAL OF RONALD AND ANISSA COULTER, et al., AND THOMAS ROSTEK, et al.,
Plaintiffs-Petitioners

IN RE APPEAL OF DOUGLAS SMITH,
Plaintiff-Petitioner

IN RE APPEAL OF JOSEPH AND DONNA CORRIERE,
Plaintiffs-Petitioners

v.

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant-Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONERS

INTRODUCTION

The petition for a writ of certiorari was placed on the

docket on June 13, 1997. On June 25, 1997, this Court rendered its decision in **Amchem Products Inc. v Windsor**, No. 96-270, 1997 U.S. LEXIS 4032.

This Court's opinion in the **Amchem Products** case has fully illuminated the facts that petitioners, along with countless thousands perhaps millions of other putative plaintiff class members have erroneously been adversely affected by Federal courts' approvals of settlements of class action proceedings.

These putative plaintiff class members have been adversely affected by being lumped into settlement classes or subclasses in which they did not belong. As a result, they have been held bound by settlements negotiated without their participation or adequate representation on terms which did not adequately, if at all, compensate them for their particular claims which had been bargained away by persons not privy to them.

The **Amchem Products** decision greatly clarified the responsibilities of Federal courts in adjudicating settlements of Federal class action lawsuits. Review of the instant cases is compellingly needed to clarify the rights of absentees following

such settlements. Do absentees have a constitutional due process right to make a collateral attack in the forum of their choice on the inadequacy of their representation and their wrongful inclusion in the settlement class? Petitioners' views on this issue will be found in their petition for a writ of certiorari and their reply brief.

The purpose of this supplemental brief is to demonstrate how the class action settlement judge in the case of **Horton v Metropolitan Life Insurance Company**, No. 93-1849-CIV-T-23A (M.D. Fla. Oct. 25, 1994) (to whom the instant cases have been erroneously transferred), violated Federal Rule of Civil Procedure 23; the Rules of Decision Act, 28 U.S.C. §1652; the Rules Enabling Act, 28 U.S.C. §2072; and the Fifth Amendment of the United States Constitution; in the light of this Court's decision in the **Amchem Products** case.

IMPACT OF THE AMCHEM PRODUCTS DECISION ON THESE CASES

This Court's decision in the case of **Amchem Products Inc., v Windsor**, 1997 WL 345149 (U.S.), 96-270, at pages 25-26,

emphasizes the design of Federal Rule of Civil Procedure 23 to protect absentees from unwarranted or overbroad class definitions:

> ... other specifications of the rule - those designed to protect absentees by blocking unwarranted or overbroad class definitions -demand undiluted, even heightened attention in the settlement context. ... Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity present when a class is litigated, to adjust the class, informed by the proceedings as they unfold. ...

In footnote 16 on page 17, this Court stated in part that:

> For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more not less caution on the question of certification.

In stark contrast, the class action settlement judge in the Horton case stated in Findings of Fact and Conclusions of Law Regarding Motions to Intervene, etc., October 25, 1994 in paragraph 47:

> These contentions ignore that the parties have presented the Court with a settlement and that Rule 23's requirements 'may be more easily satisfied in the settlement context than in the more complex litigation context. ...' (Underlining is the class action settlement judge's.)

Surely, a class action settlement judge in Tampa, Florida,

whose concept of proper class action procedure is so wrong, cannot be a more appropriate forum than a forum in Pennsylvania, the state where the illegal marketing of insurance policies occurred.

The reasons aired by the Third Circuit included:

> ... [B]ecause we must apply an individualized choice of law analysis to each plaintiff's claim, see **Phillips Petroleum Co., v Shutts**, 472 U.S. 797, 823, 105 S.Ct. 2985, 2990, 86 L.Ed.2d 628 (1985)(constitutional limitations on choice of law apply in nationwide class actions) ... . [The Tampa court was totally unaware of this.] **Georgine**, 83 F.3d at 627.

The Tampa Court, however, completely ignored this compelling reason for heightened scrutiny after certifying a class for settlement purposes only. In particular, in his Findings of Fact and Conclusions of Law Regarding Motions to Intervene, etc., of October 25, 1994, he stated in Paragraph 53:

> The only issue before the Court is the fairness and adequacy of the settlement ... an issue controlled by federal law concerning settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles.

Thus, the class action settlement judge has boasted that he

has sidestepped the application of the laws of any state. He was unaware that "constitutional limitations on choice of law apply in nationwide class actions ... ."

This reaffirms the conclusion that transfer of lawsuits based on violations of Pennsylvania law to this Florida judge is improper, prejudicial, and violative of due process.

In the same document in which the class action settlement judge boasted of not applying any state law, the class action settlement judge ruled in Paragraph 19 that the Coulters were members of the **Horton** settlement class, without applying any state law and presumably relying on Federal Rule of Civil Procedure 23. The issue of the Coulters' membership in the **Horton** settlement class is one of substantive rights and is not procedural in nature. Thus, the class action settlement judge violated the Rules Enabling Act, 28 U.S.C. §2072, which provides that "Such rules shall not abridge, enlarge or modify any substantive right ... ." The class action settlement judge also violated the Rules of Decision Act, 28 U.S.C. §1652, which provides that:

> The laws of the several states except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. ...

Another Third Circuit point favorably referred to by this Court was:

> A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42 (a) or as class actions under Rule 23, would seem preferable. Georgine, 83 F.3d at 634.

Petitioners vigorously pressed upon the class action settlement judge that their Pennsylvania claims should be adjudicated on a statewide basis either through severance or creation of a subclass. However, the class action settlement judge refused to entertain the thought.

This Court's own analysis is set forth at pages 17 and 18 of Amchem Products, as follows:

> ... First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind - classifications dependent upon the court's gestalt judgment or on the overarching impression of the settlement's fairness.

> Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. ...
>
> Federal courts in any case lack authority to substitute for Rule 23's certification criteria a standard never adopted that if a settlement is fair then certification is proper. ...

The class action settlement judge brushed aside petitioners' quest for the application of Pennsylvania law to their claims, stating that the court had avoided choice of state law problems by following Rule 23, which the class action settlement judge referred to as "Federal law."

This Court, in the **Amchem Products** decision, emphasized the importance of various state laws in class action proceedings at page 19:

> Differences in state law, the court of appeals observed compounded these disparities. See **id** at 627 (citing **Phillips Petroleum Co. v Shutts**, 472 U.S. 797, 828, 105 S.Ct. 2985, 86 L.Ed. 628 (1985).

This issue is of heightened importance in insurance business cases, as to which the Congress has specifically mandated

application of state laws.

The class action settlement judge refused to entertain petitioners' alternative quest to be placed in a subclass, leaving the impression that this approach was meritless. This Court, in the **Amchem Products** case, favorably quoted comments on the subclass concept, at page 21:

> [W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the settlement serves the aggregate interest of the entire class. But, the diversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroup.

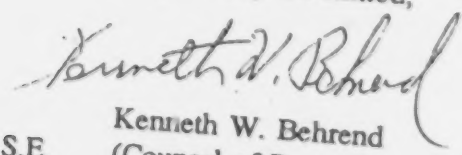
The class action settlement judge in the **Horton** case demonstrated a completely closed mind toward subclasses, which should further disqualify him from consideration as a preferable alternative forum for hearing cases arising in Pennsylvania.

CONCLUSION

This Court's decision in the **Amchem Products** case has totally exploded the ostensible legal foundations of the **Horton** case judgment, particularly the inclusion of the petitioners in the settlement class. It has also demonstrated that transfer of the instant cases to the class action settlement judge in the **Horton** case was inappropriate.

The instant cases should be remanded to the United States District Court for the Western District of Pennsylvania with instructions to proceed with consideration of the petitioners' complaints.

Respectfully submitted,



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OCTOBER TERM, 1996

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Defendant-Respondent,

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REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Length limitation allows only brief rebuttals of some of the numerous fallacious arguments set forth in the brief in opposition of the defendant-respondent Metropolitan Life Insurance Company (Metropolitan).

The brief in opposition pleads **res judicata** based on a case in which the class action settlement judge violated the Rules of Decision Act, 28 U.S.C. §1652; the Rules Enabling Act, 28 U.S.C. §2072; Federal Rule of Procedure 23; and the Fifth Amendment of the United States Constitution.

In this same case, the decisions of both the United States District Court in Tampa, Florida (the Tampa court) and the United States Court of Appeals for the Eleventh Circuit (the Eleventh Circuit) are in profound conflict with this Court's very recent decision in the case of **Amchem Products, Inc. v Windsor**, 1997 WL 345149 (U.S.), 96-270, June 25, 1997.

The truth is that petitioners' claims based on Metropolitan's violations of the Pennsylvania Insurance Company Act of 1921, the Pennsylvania Unfair Trade Practices and Consumer Protection Act,

the Pennsylvania Unfair Insurance Practices Act, and the Pennsylvania Bad Faith Insurance Statute, have never been litigated, neither in the Federal courts of Florida and Pennsylvania nor in the state courts of Pennsylvania, thanks to the maneuvering of Metropolitan.

Yet, the brief in opposition asserts at page 13 that "the District Court's transfer orders were routine exercises of discretion that raise no substantial legal issues and impair no substantive rights." This seems typical of the indifference being accorded to thousands, perhaps millions, of absentees who are, for instance, being forced to go to a courtroom some 1,000 miles away from where they live in order to litigate their rights.

Once again, on page 13, the brief in opposition states, "petitioners' attempted 'collateral attack' on **Horton** is nothing more than an abusive attempt to relitigate matters already litigated and lost." It becomes necessary to reiterate the truth -petitioners' claims of violations of Pennsylvania laws by illegal marketing of insurance policies in Pennsylvania have **never** been litigated **anywhere**.

GRANTING OF THE MOTIONS TO TRANSFER WAS AN UNCONSTITUTIONAL ABUSE OF CIRCUMSCRIBED DISCRETION

The brief in opposition plays games with the wording of 28 U.S.C. §1404(a), which provides that a United States District Court "for the convenience of parties and witnesses, in the interest of justice, may transfer any civil action to any other district or division where it might have been brought." (Emphasis supplied.)

It must be noted that the overriding criterion is "for the convenience of parties and witnesses." It is not for the convenience of Federal courts which do not want the burden of resolving complex issues, or who believe some other court might have superior expertise. Such unauthorized criteria are no where listed in §1404(a).

At page 14 of the brief in opposition, it is stated:

> Due process requires only an 'opportunity to be heard,' e.g. Phillips Petroleum Co. v Shutts, 479 U.S. 747, 812 (1985) -- not an opportunity to forum shop.

To equate Pennsylvania citizens suing in Pennsylvania courts for violations of Pennsylvania laws with forum shopping can

only be characterized as misrepresentational audacity.

It was Metropolitan that did the forum shopping by filing the motions to transfer. Such filings reflect an understandable distaste for trying to defend in Pennsylvania courts violations of Pennsylvania laws.

The assertion on page 16 that: "the transfer orders do not impair their alleged right to litigate the merits of their 'collateral attack'" is preposterous. The transfer orders will result in having the collateral attack adjudicated by the same class action settlement judge who violated the Rules of Decision Act, the Rules Enabling Act, and F.R.C.P. 23 in ruling that the Coulters are members of the **Horton** settlement class. It would require superhuman objectivity for the class action settlement judge to do other than reaffirm himself.

Footnote 4 on page 15 of the brief in opposition asserts that petitioners have misread the case of **In Re Real Estate Title & Settlement Services Antitrust Litigation**, 869 F.2d 760 (3d Cir.), cert. denied, 493 U.S. 821 (1989). It is Metropolitan that has misread the case and twisted its plain language, which says at 869

F2d at 769:

> An absent plaintiff is not subject to the burdens of distant forum litigation (thereby creating a violation of that individual's due process rights) when it is based on a class action settlement, so long as it can challenge the adequacy of representation in the forum of its choice.

It is impossible to misread that plain language. If there is a due process right to challenge the adequacy of representation in the forum of the absentee's choice, then the brief in opposition is absolutely wrong when it asserts on page 14 that the due process clause does not guarantee petitioners an unrestricted choice of venue for a collateral attack.

It must be pointed out that the petitioners are not seeking an "unrestricted choice of venue;" all they are asking is a Pennsylvania forum for cases involving Pennsylvania parties, Pennsylvania witnesses and violations of Pennsylvania laws.

For Metropolitan to claim that a statute which authorizes transfers for the "convenience of parties and witnesses" overrides this constitutional right is not plausible.

On the same page 14, Metropolitan misdescribed the

transfer statute, 28 U.S.C. §1404 (a) as being "authority to promote the interest of justice, convenience, judicial economy, and respect for the rulings of a court of coordinate jurisdiction."

The transfer statute does not mention "judicial economy," and does not mention "respect for the rulings of a court of coordinate jurisdiction." Such language cannot be legitimately used to determine the scope of authority granted by 28 U.S.C. 1404 (a). This is where the courts below went astray.

The only specifics mentioned in the statutory language is "for the convenience of parties and witnesses ... " The transfers of the instant cases were certainly not for the convenience of the witnesses who would have to travel more than 1,000 miles to appear in the Tampa courtroom. Nor were they for the convenience of the plaintiffs who would be forced to litigate their rights in a courtroom more than 1,000 miles away from where they live. Plaintiffs' due process of law rights have been severely abused, and, despite Metropolitan's denial, petitioners' cases present an important question of law warranting this Court's review.

After belittling petitioners' due process of law rights not to

have their cases transferred to a far-distant forum, the brief in opposition on page 16 turns to the McCarran-Ferguson Act, 15 U.S.C. §1011, which mandates the application of state laws to the insurance business.

The brief in opposition does not deny this, but apparently maintains that Pennsylvania law can be applied just as well by a Tampa, Florida court as in a Pennsylvania court. This is sterile reasoning that totally ignores the interest of justice.

The brief in opposition fails to grasp the fact that the courts below, in considering the motions to transfer, failed to take into account that the law of the transferor forum would have to be applied in any transferee forum. Van Dusen v Barrack, 376 U.S. 612 (1964). Thus, their granting of the motions to transfer by the courts below cannot be intellectually or legally sustained.

At page 27, the brief in opposition belittles the significance of this Court's decision in Amchem Products Inc. v Windsor, (No. 96-270, 1997 U.S. LEXIS 4032 June 25, 1997). All the brief in opposition says about the holding in that landmark case is:

As this Court confirmed in Windsor, the Horton

> court was not required to ignore the proposed settlement in considering whether to certify the class under Rule 23 (b)(3), 1997 U.S. LEXIS 4032.

Actually, this Court's decision in the **Amchem Products** case totally destroyed the ostensible legal foundations of the Eleventh Circuit's decision in the **Horton** case and revealed that the class action settlement judge had failed to apply the due process safeguards which FRCP 23 was designed to protect.

Two of the major holdings in the **Amchem Products** case were that Rule 23's criteria should be applied with undiluted strength in class action settlements, and that constitutional limits on choice of state law apply in nationwide class action settlements. The class action settlement judge in the **Horton** case specifically and avowedly violated both of these principles in rejecting the Coulters' motions to have Pennsylvania law applied to their claims by being separated from the **Horton** settlement class either through severance or creation of a subclass.

There is a self-contradictory character to the argumentation contained in the brief in opposition.

Subsection III.A. on page 20, argues that "the Horton Judgment is not properly before this Court."

Subsection III.B. on the next page argues that "Res Judicata [Effect of the Horton Judgment] Precludes Petitioners' Attack ..."

Subsection III.D. on page 27, argues that "Petitioners' Other Attacks on the Horton Settlement Are Also Baseless."

Actually, the correct statement of the law regarding the binding effect on unnamed plaintiffs in class action settlements is found in Newberg on Class Actions, Chapter 9, §9.26 on page 9.72:

> A brief analysis, however, reveals that an injunction will not lie against absent members to enjoin other litigation except to the extent that the court has and obtains personal jurisdiction over specific class members by individual service of process.

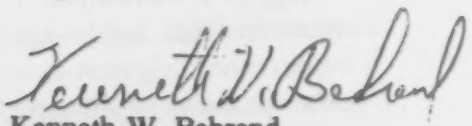
Contrary to this rule of law, the class action settlement judge issued a nationwide injunction purportedly against lawsuits by absent parties. Since there was no individual service of process, this gesture must have been made only for its in terrorem effect.

CONCLUSION

The brief in opposition does not contain any valid arguments that should prevail against the fact that thousands perhaps millions of absentees have wrongfully been deprived of their due process rights by Federal courts making rulings in conflict with the holdings of this Court in the **Amchem Products** case.

The instant cases should be remanded to the United States District Court for the Western District of Pennsylvania with instructions to proceed with consideration of petitioners' complaints.

Respectfully submitted,



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